United States Court of Appeals

for the Second Circuit

APPENDIX

76-7252

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

CITY OF DETROIT, et al.,

v.

GRINNELL CORPORATION, et al.

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, Claimants,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX - VOLUME II

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HOWREY & SIMON
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Attorneys for Appellants

PAGINATION AS IN ORIGINAL COPY

HOWREY & SIMON
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August 25, 1976

Mr. John A. Brascia
Deputy Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: City of Detroit, etc. v. Grinnell Corp., et al.
68 C 4026-7-8; C/A Nos. 76-7252, 76-7253 76-7254

Dear Mr. Brascia:

In conversations with Ms. Rosalie Brulee of your office today, she commented that there is still some concern about the legibility of page 318 of Volume I of the Appendix in the above-referenced case. That page represents a one-page pleading filed in the District Court on May 11, 1972, by a party not involved in the current appeal and we had it reproduced as legibly as possible and inserted again by our printer last week.

Nonetheless, I have had that page retyped, and ten copies are enclosed herewith. I would appreciate your having it stapled in each of the ten Volumes for me.

Thank you very much, and I apologize for the inconvenience.

Sincerely,

G. Joseph King

GJK/fle

Enclosures

HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006
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August 19, 1976

Mr. John A. Brascia
Deputy Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: City of Detroit, etc. v. Grinnell Corp., et al.
68 C 4026-7-8; C/A Nos. 76-7252, 76-7253, 76-7254

Dear Mr. Brascia:

I am returning to you today under separate cover the nine copies each of Volumes I and II of the Appendix in the above-entitled case which you sent to me with your letter of August 5, 1976. The pages which you designated as illegible have all been replaced with the best copies that we were able to make and I trust you will find them acceptable.

As discussed with you by telephone, pages 575-607 in Volume I, and pages 1165-1174 in Volume II, each constitute the original slip opinions in this case and are immediately followed in the Appendices by printed versions of these same opinions (see pages 608-617 and 1176-1179.) Although this fact is designated in footnotes to the Table of Contents in each Volume, I am including a page noting this fact immediately preceding each of the original slip opinions.

In addition, I wish to point out that pages 333-336 in Volume I contain only a table of contents and table of authorities. These pages do not contain material which is important to the appeal, although clearer replacement copies were included.

Finally, pages 1129-1132 and 1147-1150 of Volume II consist merely of exhibits which are not materially important to the appeal. Since we do not have access to any better copies, we are unable to furnish completely legible copies for the Appendix. However, these pages also are not essential to the appeal and I trust will be satisfactory to you.

Thank you very much for your cooperation in this matter.

Sincerely,

G. Joseph King

GJK/fle

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* Because the official Opinion (A1165-A1175) did not lend itself to high quality reproduction in this Appendix, for the Court's convenience a copy of the Opinion as reported in 5 CCH Trade Reg. Reptr. ¶ 60,913, has also been included.

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BEST COPY AVAILABLE

68 Civil 4026 CITY OF DETROIT, etc. vs. GRINNELL CORP., et al

DATE	PROCEEDINGS	Date Order or Judgment Note
Jan.26-73	Filed FINAL JUDGMENT. Ordered that Counsel for the Class Representatives, David Berger and David Berger, P.A., Attorneys at Law are allowed $1l,011.73 as out-of-pocket litigation expenses to 1/20/72 to be paid from initial installment of the Settlement Fund; Ordered Counsel for the Class Representatives is awarded attorney's fees in the amt. of $1,500,000. to be paid from the Settlement Fund; This Court retains jurisdiction for the purpose of: (a) determining the petitions of Weil, Gotshal & Manges; Liebman, Eulau, Robinson & Perlman; and Parker, Chapin & Flattau, and (2) of Wald, Harkrader & Ross for an apportionment of the attorney's fee awarded to the Class Representatives; and (b) determining the manner and time of payment of said fees; (c) determining further allowance and out-of-pocket expenses to Counsel for the Class Representatives. Metzner, J. (Also in 68 Civ. 4027 & 68 Civ. 4028).	(LN
Jan.29-73	Filed Notice of Appeal by Bay Fair Shopping Center; Exxon Corp. successor by merger to the Humble Oil & Refining Co.; Friendwood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co., claimants herein (Also in 68 Civ. 4027 and 68 Civ. 4028). (mailed notice).	
Feb.1-73	Filed Amended Notice of Appeal by Bay Fair Shopping Center; Exxon Corporation, successor by merger to the Humble Oil & Refining Co., Friedswood Development Co.; Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co. (mailed notice). (Also in 68 Civ. 4027 and 68 Civ. 4028)	
b.5-73	Filed copy of Judgment entered 1/23/73 with notice of entry.	
b.7-73	Filed - Descripton of Parts of Trascript pur. to Rule 10(b) Fed.R.App.P. to be included in Record and Statement of Issues. (Filed in M 19-92 also)	
Feb.8-73	Filed ORDER that J.C.Penney Co.Inc. and Hutzler Brothers be added to Schedule "A" annexed to Final Judgment as persons who are excluded from the Class described in paragraph 1 of the Final Judgment.Metzner,J. (mailed notice).	
Feb.16-73	Filed Affidavit in opposition (Docketed also in M 19-92). (& in 2 related cases). to Petition for Award of Counsel Fees.	
eb.16-73	Filed letter from Trubin Sillcocks Edelman & Knapp - objecting to the excessive counsel fees.	
Feb.16-73	Filed AMENDED NOTICE OF APPEAL (Amendment to Prior Notice of Appeal by Bay Fair Shopping Center, Exxon Corp., successor by merger to the Humble Oil & Refining Co.,Friendswood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co.(mailed notice) in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028).	
Feb.20-73	Filed Notice of Appeal by Supermarkets General Corp., Shop Rite of Clark, Inc. Shop-Rite of Madison Twp.Inc., and additional claimants (see entry in M 19-92). (mailed copies - labels for service list provided).	
Feb.15-73	Filed Notice of Appeal by Aldon Industries, Inc., Clifton Yarn Mills, Inc.,etal (additional claimants see entry in M 19-92). (mailed copies)	
Feb.21-73	Filed Bond for Costs on Appeal by Aldon Industries, Inc. and 19 other claimants ($250. Reliance Insurance Co.).	
Mar.5-73	Filed stipulation ad to Record.	
r.5-73	Filed Affidavit of Thomas F. Curnin on behalf of the Class Committee in answer to th motion of Cutters Exchange,Inc. for leave to file a sworn statement of claim beyond the time period established by Settlement Order #1, in 68 Civ.4026,68Civ.4027 & 68 Civ.4028 filed 1/26/73.	
Mar.8-73	Filed MEMO.END. on Application for Allowance of Attorneys' fees filed 1/26/73. It may be that counsel might be entitled to some portion of whatever compensation Weil,Gotshal & Manges firm may obtain as a result of its application for a fee in national class actions, but that seems to me to be a matter between the respective firms. The application is denied. So ordered. Metzner, J.	
Mar.7-73 Ju	Filed OPINION #3928.Metzner, J. Plaintiffs seek to be excluded from the class as certified by the order of 12/13/71, and they seek relief from their default on the ground of "excusable neglect.". The motion is denied. So ordered. (mailed notice).	

FPI—LK—12-3-63—15M—2946

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68 Civil 4026 CITY OF DETROIT, etc. vs. GRINNELL COR'., et al

Mar.12-73	Filed Appellants' Designation of Exhibits for Determining the Appeal. (Also in 68 Civ. 4027 and 68 Civ. 4028).
Mar.8-73	Filed Certified Record on Appeal to the U.S.C.A. in 68 Civ. 4026.
Mar.21-73	Filed Supplemental Certified Record on Appeal to the U.S.C.A. in 68 Civ. 4026.
Mar.22,73	Filed defts. memo in opposition to motion for reargument.
Mar.12-73	Filed Appellants' Designation of Exhibits for determing the appeal in 3 Grinnell Cas

68 Civil 4026 CITY OF DETROIT, etc. v. GRINNELL COUP., et al

CIVIL DOCKET

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
Apr.5-73	Filed Notice of Appeal by Supermarkets General Corp.; Shop-Rite of Clark, Inc.; Shop-Rite of Madison Twp., Inc., Shop-Rite of Midway, Inc., Shop-Rite of Linden, Inc.; Shop-Rite of Watchung, Inc., Bristol Foods Co. Inc.; Fairlese Hills Food Co. Inc.; Lyons Shop-Rite, Inc.; Shop-Rite of Bergenfield, Inc.; Shop-Rite of Burlington, Inc.; Shop-Rite of New Brunswick, Inc.; Uniondale Foods; Shop Rite of Clifton, Inc.; Crown Drug Stores Kings Bay, Inc.; Crown Drug Stores Kings Bay, Inc.; Crown Drug Stores Huntington, Inc.; Crown Drug Stores, Inc.; Gerung's Inc.; Steinbach Co. Inc.; and R.J. Coerke Co.Inc.	
Apr.13,73	Filed Order and Stip. Refiling of documents. METZNER, J. (Also in 68 Civ 4027 and 68 Civ.4028)	
Apr.13,73	Filed ~~Order and Stip re Record~~ Second Stip as to Record. (also filed in 68 Civ. 4027 and 68 Civ. 4028)	
Apr.11-73	Filed Transcript of proceedings, dated 4-10-73	
Apr.16-73	Filed Supplemental Record on Appeal to the U.S.C.A.	
Apr.17,73	Memo End. on Notice of Motion for Reargument dated 3/13/73. Metzner, J. (also in 68 Civ 2774, 4027 and 4028.) The motion for reargument is granted. Upon reargument the original determination is adhered to. The Clerk is directed to docket and file this order in 68 Civ. 4026, 4027 and 4028. So ordered. Metzner, J. (Filed in 68 Civ. 2774).	
May 14-73	Filed stipulation re: record on appeal. (Also in 67 Civ. 4027 and 68 Civ. 4028).	
May 15-73	Filed Certified Record on Appeal to the U.S.C.A.	
May 22-73	Filed Change of Address of Donovan Leisure Newton & Irvine to 30 Rockefeller Plaza, N.Y. ~~10005~~ 10020 (Tele. 212) 732-4100.)	
7-25-73	Filed transcript of record of proceedings, dated June 5, 1973.	
Jun-14-74	Filed true copy of USCA order (with opinion attached) that the judgments and order of the D.C. are affirmed as to the judgment approving the settlement but as to the judgment relating to the standing of other attorneys to participate in any fee award said judgment is hereby dismissed for lack of appellate jurisdiction.	

to next page----

6-14-74 -- continued from page 8:
It is further ordered, adjudged and decreed that the order as to the fe
award is hereby reversed and that the action is hereby remanded to t
District Court for further proceedings in accordance with opinion of
this court with costs to abide the event.

Jun- 5-74 Filed true copy of USCA order (with Opinion attached) that the orders of the D.C. are affirmed with costs in the sum of $722.83 taxed against the appellants. - Docketed as judgment #74,503 on 6-12-74

Jul- 3-74 Filed satisfaction of Judgment #74,503

[illegible] Pretrial Order #3 that the settlement in the class actions [illegible] (76 Civ 6011 and 74 Civ 1028) is fina[illegible] [illegible] making payment of settlement funds by defendants as [illegible]; plaintiffs shall cause notice to be done and dated hereto as [illegible] to be given to each class [illegible] sworn statement of claim which has to be [illegible]. The order of challenge shall provide that a hearing shall be held on 11-20-74 at 10 A.M. in Room [illegible] at which time counsel may appear and be heard. The class action conditions [illegible] of all further notices shall be the responsibility of counsel for plaintiffs-class representatives. Further hearing on the award of counsel fees to take place upon expiration of the [illegible] challenges to claims and upon completion of the [illegible] of the settlement fund, or at such time as shall be ordered by the Court, on the application by counsel, etc. All pretrial [illegible] with the hearing on the award of counsel fees are directed to confer at once on a schedule of pretrial [illegible] and to propose pretrial orders when appropriate [illegible], J. m/

10-24-74 Filed Affidavit of H.Laddie Montague Jr., Esq. ---- counsel for class representative-plaintiffs re settlement order No. 3, Section I B, dated Sep. 30-74 (for all 3 actions - 74 CIV 4026, 27 and 28.)

Oct-24-74 Filed Appendix C to affdvt. of H. Laddie Montague, Jr.

Nov- 7-74 Filed order that pursuant to settlement order #3, dated 9-30-74, Morris A. Shapiro, Esq., 61 B'way, NYC 10006, is appointed Special Master to hear and report to the Court on the disposition of the claims of a class member objecting to Part IV of the Challenge Report. The compensation of the Special Master shall be fixed on his affdvt. of services upon notice to counsel for the class representatives. So ordered. -- Lasker, J.

Nov-12-74 Filed affdvt. of Special Master Morton I. [illegible] and [illegible] hearing and decision.

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City of Detroit, et al. v. Grinnell Corp., etc. et al.

Judge Metzner

68 CIV 4026

110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date C Judgme
-22-7[illegible]	Filed on behalf of Brimfield Protection Co. devisee, affidavit of Michael O. Miller in support of claim.	
-10-7[illegible]	Filed application of David Berger, [illegible] for reimbursement of expenses.	
-10-7[illegible]	Filed supplement on above application: Various claimants identified the disallowed items Nos. 2,[illegible],8,11,17,19,[illegible],21,25,27,28,[illegible], 42,46 -- there shall be deducted from the requested sum of $8,305.37 the amount of $800.00, leaving a total of $1,[illegible]. Order signed. -- Metzner, J.	
c-10-7[illegible]	Filed order that David Berger, P.A. be reimbursed for out-of-pocket expenses incurred in the prosecution of these class actions and in obtaining approval of and in administering the settlement thereof in the amount of $31,[illegible] which amount includes $7,[illegible] ordered allowed in the final judgment of October 2, 1975. The foregoing sum shall be paid from the interest earned on the portion of the settlement fund already paid to defendants to counsel for plaintiff-class representatives, held and to be held in escrow by the depositary bank pursuant to the terms of settlement of the classes pursuant to the terms of settlement. -- Metzner, J.	
1-31-75	Filed pltf's affdvt. of H. Laddie Montague, Jr. (for class representatives-plaintiffs)	
2-03-75	Filed supplemental affdvt. H. Laddie Montague, Jr. to affdvt. of 1-29-75	
2-03-75	Filed notice of change of address of Attorneys for Regis Paper Co. and Goldblatt Bros., Inc.	
2-24-75	Filed pltf's affdvt. of H. Laddie Montague, Jr. re claims.	
3-10-75	Filed notice of motion by Special Master Morton A. Shapiro to adopt and confirm report, fixing compensation of Special Master, etc. - ret. 3-18-75	
3-10-75	Filed application of Special Master to fix compensation	
3-10-75	Filed Report of Special Master.	
3-13-75	Filed Transcript of record of proceedings, dated [illegible] on 10-17-75	
03-20-75	Filed Order re: Challenges to sworn statements of claim --- Ordered that the claims are allowed, sustained, reduced or disallowed as indicated in this order. A copy of this order shall be docketed in 68 Civ 4028 and 68 Civ 4027 with the same force and effect as if the original thereof were filed therein. -- Metzner, J. m.n.	
3-20-75	Filed memo endorsed on application of Special Master to fix compensation: No one appearing in opposition the Special Master is allowed a fee in the sum of $7,500 to be paid from the settlement fund in the custody of counsel for the class. So ordered. -- Metzner, J. m.n.	
03-26-75	Filed APPENDIX A/1 Claim Nos. 00001-09450)	
03-26-75	Filed APPENDIX A/2 Claim Nos. 09451-15244) placed in this action - but also for 68-4027 and 28	
03-27-75	Filed order re approval of 1st Distribution of the Settlement Fund in the amount of $9335, 083.33 (motion for approval under the rule) -- Metzner, J. m/n	
03-27-75	Filed order that the motion by counsel for plaintiffs-class representatives, David Berger, P.A. Attys at Law for reimbursement of costs incurred during the period 11-1-74 to 2-28-75 is hereby granted. So order d. - Metzner, J. m/n	
5-8-75	Filed letter by Attorney for claimant John Wanamaker (Saul Ewing Remick & Saul, Esqs.) informing parties of change of address.	
06-05-75	Filed by counsel for pltf.class representatives: notice of motion to withdraw portions of funds and ORDER to withdraw portions of the settlement fund in order to pay expenses already incurred -- Metzner, J. --	

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ATE	PROCEEDINGS	Date Order or Judgment Noted
31-75	Filed on behalf of Attorney for the class affdvt. of H. Laddie Montague re time expended on litigation.	
31-75	Filed on behalf of Attorney for the class affdvt. of Herbert B. Newberg re legal services.	
31-75	Filed on behalf of Attorney for the class affdvt. of David Berger re legal services	
31-75	Filed petition of counsel for the class representatives for award of counsel fees and costs	
31-75	Filed by Attorney for the Class proposed Findings of Fact.	
31-75	Filed pre-trial brief in support of the petition of petition for counsel fees (of David Berger, P.A.)	
31-75	Filed on behalf of Attorney for the class affdvt. of service of documents filed today.	
-07-76	Filed transcript of record of proceedings dated 11-10-75 (for all 3 cases: 4026, 27 and 28)	
-15-76	Filed order that judgment was entered on 1-22-73 approving settlement agreement for all 3 cases which provided for 2 installment payments by Holmes Protection Inc. First payment was made. 2nd payment which was due on 1-15-76 is hereby adj. to 7-15-76. Counsel fees deferred until 7-15-76 to become final, after the expiration of any and all appellate rights with respect to Attorneys fees. -- Metzner, J.	
-21-76	Filed OPINION #44274. Pursuant to the direction of the Court of Appeals, this court held an evidentiary hearing on the application for counsel fees by counsel for the class in this litigation. After hearing the evidence, find that the hours allocated for the periods that were not covered by time records are fair and reasonable, etc. The total basic fee amounts to $[illegible],760.75 and to be paid as indicated herein, and the basic fee in the remaining categories of work performed to 10-31-75 results in allocations of $700,589.00 as indicated herein. So ordered. As to any further services that may require the fixation of fees, counsel may apply ex parte on proper affdvt. for their payment. -- Metzner, J.	
-27-76	Filed memo file, [illegible] Eaton Corp., Lindenwood Development Co., Chrysler State Bland Corp., International Building Corp. for Gulf Oil Co.	
-27-76	Filed letter by Dell Corbat & Langer, Esqs. dtd. 10-31-75 re re attorneys fees.	
-27-76	Filed copy of affdvt. of Joel E. Hoffman as "Pltf. Fair Rate exhibit A"	
-27-76	Filed copy of affdvt. of A. Paul Victor as "Defts. exhibit B"	
-27-76	Filed copy of letter by Howrey & Simon dtd. 11-6-75 to Thomas D. Brislin, Esq. as "Defts. exhibit C"	
-27-76	Filed copy of letter by Howrey & Simon dtd. 9-2-75 to Judge Metzner as "defts. exhibit D"	
-27-76	Filed copy of letter by Chambers of Judge Metzner dtd. 2-25-75 to Gordon D. Spivack, Esq., William Simon, Esq., Barry J. Brett, Esq. re Defts. exhibit E"	
-27-76	Filed copy of [illegible] MOST FAVORABLE SUPPORTING PETITIONER'S [illegible] "Defts. exhibit F"	
-27-76	Filed memorandum that the order of [illegible] entered (opinion #44,276) [illegible] on page [illegible] of Minutes of [illegible]. -- Metzner, J.	

continued on page 12

68-[illegible] C.A.

City of Detroit, et.al. v.
Grinnell Corp., et.al.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date C Judgme
04-27-76	Filed FINAL JUDGMENT awarding counsel fees and costs as indicated herein. -- Metzner, J. JUDGMENT ENTERED Clerk m/n	
05-25-76	Filed notice of appeal to the USCA for the 2nd Circuit by Bay Fair Shopping Center; Exxon Corp. successor, etc. from Final Judgment awarding attorneys fees. -- copy mailed to Brownell, Lord Day & Taylor Esqs.	
06-11-76	Filed stipulation and order that for the purpose of appeal, the 3 Civil actions 68-4026, 27 and 28 are consolidated and that the appeal proceed for all purposes in 68 CIV 4026 -- Metzner, J.	
06-17-76	Filed one envelope containing pltfs exhibits No. 4 thru 9.	

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10/31

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al., -against- GRINNELL CORPORATION, et al.	:	68 Civ. 4026 (CMM) (E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al., -against- GRINNELL COPPORATION, et al.	:	68 Civ. 4028 (CMM) (E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC. -against- GRINNELL CORPORATION, et al.	:	68 Civ. 4027 (CMM) (E.D. Pa. Civ. 68-1479)

PETITION OF COUNSEL FOR THE CLASS REPRESENTATIVES FOR AWARD OF COUNSEL FEES AND COSTS

Petitioner is David Berger, P.A., Attorneys at Law, 1622 Locust Street, Philadelphia, Pennsylvania 19103. Petitioner, counsel for the class representatives in each of the three above-captioned class actions, respectfully submits this Petition for an award of counsel fees in the amount of $1,248,614.50 to be paid pro rata from the disbursements still due all class claimants from the remainder of the settlement fund created in the above actions. Petitioner also requests similar pro rata reimbursement from the settlement fund in the amount of $53,267.40 for costs incurred in employing paraprofessionals in connection with these

actions and $27,505.00 for costs incurred in employing professional accountants in connection with these actions.

As grounds for this Petition, Petitioner relies upon all proceedings heretofore had in these causes, including all documents already filed in these actions, as well as all papers filed on the appeals in these actions in the United States Court of Appeals (including Nos. 73-1221 and 73-1420). Additionally, Petitioner relies upon the attached affidavits of H. Laddie Montague, Esq., Herbert B. Newberg, Esq., and David Berger, Esq., as well as the accompanying Pre-Trial Brief In Support Of Fee Petition Of David Berger, P.A.

Respectfully submitted,

LORD, DAY & LORD

By _____
A Member of the Firm

Attorneys for Counsel for
Class Representatives
25 Broadway
New York, New York 10004

Of Counsel:

Herbert Brownell
Gordon B. Spivack
Thomas D. Brislin

DAVID BERGER, P.A.,
Attorneys at Law
Counsel for Class Representatives
1622 Locust Street
Philadelphia, Pennsylvania 19103

Of Counsel:

David Berger
H. Laddie Montague

TO:

HOWREY & SIMON
1730 Pennsylvania Avenue
Washington, D.C. 20006

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, NY 10022

LIEBMAN, EULAU, ROBINSON & PERLMAN
32 East 57th Street
New York, NY 10022

PARKER, CHAPIN & FLATTAU
530 Fifth Avenue
New York, NY 10036

10/31

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.,	:	68 Civ. 4026 (CMM) (E.D. Pa. Civ. 68-1478)
v.	:	
GRINNELL CORPORATION, et al.	:	M 10-92

MANHATTAN-WARD, INC., et al.,	:	68 Civ. 4028 (CMM) (E.D. Pa. Civ. 68-1489)
v.	:	
GRINNELL CORPORATION, et al.	:	

1225 VINE STREET BUILDING, INC.	:	68 Civ. 4027 (CMM) (E.D. Pa. Civ. 68-1479)
v.	:	
GRINNELL CORPORATION, et al.	:	

PRE-TRIAL BRIEF
IN SUPPORT OF FEE PETITION
OF DAVID BERGER, P.A.

Of Counsel

Herbert Brownell
Gordon B. Spivack
Thomas D. Brislin

641

LORD DAY & LORD
25 BROADWAY
NEW YORK, N.Y. 10004
344-8460

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et. al. v. GRINNELL CORPORATION, et. al.	:	68 Civ. 4026 (E.D. Pa. Civ. 68-1478) M 19-92
MANHATTAN-WARD, INC., et al. v. GRINNELL CORPORATION, et. al.	:	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC. v. GRINNELL CORPORATION, et. al.	:	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)

PRE-TRIAL BRIEF
IN SUPPORT OF FEE PETITION
OF DAVID BERGER, P.A.

This pre-trial brief is filed in support of the accompanying fee petition of David Berger, P.A. (hereinafter "Petitioner"), sole counsel for all the class representatives in the three national class actions established pursuant to Settlement Order No. 1 in Civil Action Nos. 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028. Petitioner has petitioned this Court for an award of counsel fees, as counsel for the class representatives in such actions, to be paid proportionately out of the recovery of all claimant class members.

The history of this litigation, including controlling findings as to many of the facts relevant to the accompanying petition, is detailed in the unreversed findings of this Court in City of Detroit v. Grinnell Corp., 356 F.Supp. 1380, (S.D.N.Y. 1972), and in the findings of the Court of Appeals in City of Detroit v. Grinnell Corp., 495 F.2d 448, (2d Cir. 1974). Additional relevant facts concerning the litigation, including a description of activities relating to settlement administration and distribution subsequent to the decision of the Court of Appeals, are set forth in the accompanying "Proposed Findings Of Fact" and supporting affidavits submitted by Petitioner. Given the Court's extensive personal knowlege of, and participation in, this litigation, the relevant facts will be discussed herein only in relation to the remaining factors to be considered by this Court in awarding fees to Petitioner in light of the opinion of the Court of Appeals.

I. The Standards To Be Used On Remand In Setting The Counsel Fee Herein

In a detailed opinion analyzing the facts of this case, the Court of Appeals affirmed this Court's order approving the class settlement negotiated by Petitioner, reversed this Court's order awarding Petitioner counsel fees of $1.5 million and remanded for further evidentiary hearings as to certain fact issues relevant to the fee award in light of the standards set out in its opinion. 495 F.2d 448

The Court of Appeals held that objectors therein to the petition for counsel fees were entitled to an evidentiary hearing, including the opportunity for the introduction of evidence, and cross-examination as to disputed factual issues. Furthermore, the Court of Appeals held that in light of the information now required for setting fees under the standards described below, the District Court erred in awarding any fee without filling the "factual voids" as to a number of relevant points.[1] 495 F.2d at 472-73

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1. The only specific disputed fact noted by the Court of Appeals related to the amount of hours claimed to have been expended by Petitioner. 495 F.2d at 472-473. The "factual voids" were said to include: (a) the lack of definition of 'senior attorney' in the fee petition; (b) the lack of any breakdown of the hours of the 'senior attorneys' by each attorney; (c) the lack of any breakdown of hours "into the various

In determining the applicable standards for awarding counsel fees pursuant to the equitable fund doctrine, the Court of Appeals made it clear that lower courts were still required to consider all the traditional factors, as previously detailed by this Court in an earlier case, normally taken into account in setting fees:

> "There are many parameters that affect the value of legal services and which, therefore, must be considered by a court evaluating a fee request. In another recent antitrust case the District Court which granted the instant fee petition enumerated those parameters. In Transworld Airlines, Inc. v. Hughes, 312 F.Supp. 478 (S.D.N.Y. 1970) modified on appeal, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the District Court adopted the 'generally accepted factors to be weighed in determining a reasonable attorney's fee' from Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F.Supp. 258 (M.D.Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part and rev'd in part, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), viz.:
>
> (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,
>
> (2) the standing of counsel at the bar--both counsel receiving the award and opposing counsel,
>
> (3) time and labor spent,

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facets of the case"; (d) the lack of any evidence as to the paraprofessionals ' experience and training, as well as their wages; and (e) "insufficient evidence" as to Petitioner's separate fee arrangements with class members who are clients. 495 F.2d at 473.

(4) magnitude and complexity of the litigation,

(5) responsibility undertaken,

(6) the amount recovered,

(7) the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff.

312 F.Supp., at 480.

Finally, the District Court added that the attorney's 'risk in litigation' is another factor to be considered." 495 F.2d at 470.[2]

But, in light of the lack of precision evident in the decisions of lower courts applying such standards, the Court of Appeals went on to hold that henceforth in determining fee awards District Courts would be required to begin their inquiry by first calculating the basic minimum value of the services of the petitioning firm in relation to "fairly definite information" as (a) to the number of hours expended by each attorney involved,

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2. Thus, in Grinnell, supra, the Court of Appeals did not depart from its prior holding in Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050-53, (2d Cir. 1973), where a unanimous panel explicitly held that all the factors, cert denied, 414 U.S. 1092 (1973), utilized by this Court in TWA v. Hughes, supra, had to be considered in awarding fees in antitrust actions under the equitable fund doctrine.

(b) the types of work done by each attorney and (c) the hourly rates normally charged for similar work by attorneys of like skill in the area when billed on the basis of hourly rates of compensation, without reference to risk of litigation, the amount recovered, and other relevant factors. 495 F.2d at 470-71. After thus determining the basic non-contingent billing value of the "time and labor spent" by multiplying the number of hours expended by each lawyer by his normal billing rate, the Court of Appeals held that the ". . .other, less objective factors, can be introduced into the calculus." 495 F.2d at 471.

The only comment made by the Court of Appeals in reference to these "other, less objective factors" was to note that the concept of "risk of litigation", or probability of success, included traditional fee award elements: (1) the practical benefits from a prior related government action, (2) the novelty and complexity of the issues, and (3) the responsibility assumed by counsel in view of previously filed civil actions instituted by others. 495 F.2d at 471. The Court concluded its discussion of the applicable legal standards by stating that the proper guidelines for a remand hearing had been laid out by the Court of Appeals for the Third Circuit in Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation, 487 F.2d 161 (3d Cir. 1973),

where it was noted that the influence, or value, of these additional factors would vary from case to case. 495 F.2d at 473.[3]

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3. In Lindy, supra, the Third Circuit also held, with a slightly different formulation, that all the traditional elements used in setting fees were still relevant to the District Court's final valuation of attorneys' services. The Third Circuit stated that once the lower court had determined (1) the number of hours spent in various legal activities by individual attorneys and (2) the reasonable hourly rates for the individual attorneys (as determined by their standing and experience), there would still be "at least two other factors that must be taken into account in computing the value of attorneys' services." The intial of these additional factors was said to be (3) "the contingent nature of success." In examining this factor, according to the Third Circuit, the court is to determine, among other things, whether the attorney has private fee agreements guaranteeing payment regardless of any recovery, and any facts reflecting probability of success in the particular case, such as whether or not a beneficial government criminal action had been concluded. The final additional factor to be considered is (4) the "quality of an attorney's work." As part of this analysis, the Third Circuit said that the lower court is to consider ". . .the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained." The Third Circuit noted that the amount of recovery ". . . may be the only means by which the quality of an attorney's performance can be judged where a suit is settled before any significant in-court proceedings." 487 F.2d at 168.

In Merola v. Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974), a subsequent decision involving fee awards under the equitable fund doctrine, the Third Circuit expressly reaffirmed this four step analysis of Lindy, supra and had the following summary comments:

> "The Lindy standards isolate the primary factors that should be examined in developing a reasonable attorneys' fee. The first two factors (time spent and reasonable rate) produce what might be considered the market

While the formulations of the relevant factors have varied slightly from case to case, the courts that have subsequently considered fee awards in antitrust class actions under the equitable fund doctrine have expressly followed the aforementioned criteria set forth in Grinnell, supra, and Lindy, supra. Arenson v. Board of Trade of the City of Chicago, 372 F.Supp. 1349, (N.D. Ill., 1974); In re Gypsum Cases, 386 F.Supp. 959,962 (N.D. Calif. 1974); Doughboy Industries, Inc. v. American Cyanamid Co., 1975-2 Trade Cases ¶60,452 at p. 67,028, (D. Minn., 1975). In re International House of Pancakes Franchise Litigation, 1974 Trade Cases ¶74,932 at 96,171 (W.D. Mo. 1974) (M.D.L. Dkt. No. 77), aff'd in part and rev'd and remanded in part on other grounds (sub nom., Grunin v. International House of Pancakes) 513 F.2d 114 (8th Cir. 1975), cert filed 7/5/75; In re International House of Pancakes Franchise Litigation (W.D. Mo. 1975) (Order Awarding Attorney Fees filed July 11, 1975); Liebman v. J.W. Peterson Coal & Oil Co., 63 F.R.D. 684,690-691 (N.D. Ill., 1974).[4]

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value of the attorneys' services. The latter two (risk and quality of work) permit the district judge the needed flexibility to tailor the award to the actual performance of counsel. The end result--an amalgam of expected value and delivered performance--represents a reasonable fee under normal circumstances." (at p. 298).

4. In the recent case of Labbee v. Wm. Wrigley, Jr. Company, Civ. No. 4029, (W.D. Wash. 1975) (Order Filed June 12, 1975 at p. 3), the mint oil antitrust litigation, Judge Boldt

The application of the holdings in Grinnell supra, and Lindy, supra, necessarily entails the exercise of a substantial amount of informed discretion on the part of a District Court. The final valuation of the attorneys' services may vary significantly on a case-by-case basis depending upon analysis by the Court which has personal knowledge of the prior proceedings and of the particular contingencies involved, as well as the quality and final results of the work of counsel. In attempting to translate the risk and quality elements peculiar to Petitioner's work "into mathematical terms", this Court can be guided by the recent decisions of other courts awarding fees in major antitrust class actions where the facts have allowed for a detailed consideration of these "other, less objective factors".[5]

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awarded lead counsel firm a fee of one-third the net settlement fund (after payment of costs and expenses) of $13,552,250 plus interest. The order of 6/12/75 utilizes the standard factors on fees but does not expressly follow Grinnell, supra or Lindy, supra.

5. In some situations, the minimum value of the attorneys' services, as determined solely by the hours expended and standard hourly billing rates, may already constitute a large proportion of the total recovery, and thus not allow for any significant increase in valuation, regardless of contingencies and quality of work. This was noted by the Third Circuit in Lindy, supra, at p. 168. Thus, the "percentage of recovery" guidelines that some courts utilized prior to Lindy, supra, still set a maximum level for fee awards.

For example, in Liebman, supra, a case involving

II. Application Of The Appropriate Fee Standards To The Work Of Petitioner Herein

In order to properly evaluate Petitioner's services herein, the Court must make two separate calculations. First, the minimum value of Petitioner's services must be established, as determined by (a) the number of hours expended by each attorney on various types of legal activity multiplied by (b) standard hourly billing rates appropriate to each attorney in

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a cash settlement of $1,800,000 with a possible "credit" fund of $500,000, the court added nothing for "contingency, complexity or amount of the recovery" (at pp. 700-701) and stated that the total fees based upon standard hourly rates already amounted to 15% of the combined cash and credit settlement and 19% of the cash fund. (at p. 702). Additionally, the court noted that the major force in obtaining the settlement was a state attorney general's office which had no contingency aspect to any of its work (at p. 694) and that the services of private counsel, who still received almost two-third's of the total award, were generally duplicative and unnecessary (at pp. 697-698).

Similarly, in the International House of Pancakes, supra, litigation where there was no actual monetary fund, but rather a settlement incorporating changes in franchise arrangements that the court valued at $12,500,000, the defendants agreed to pay counsel fees set by the court up to a maximum of $1,250,000. The court awarded the entire $1,250,000 to a large number of petitioning counsel, but stated that if an actual fund of $12,500,000 had been available, it would have awarded about $2,500,000 in total fees (1974 Trade Cases at p. 96,171). The two firms that were said to be co-lead counsel had a basic value for time expenditures by attorneys at their standard hourly rates of $760,053.75 (Order of July 11, 1975 and "Joint Application For Attorneys' Fees By Morris, Mitchell, Larson, King, Stamper and Bold"). The final award to the two firms was $975,000 of the $1,250,000 "counsel fee fund."

light of what similar attorneys would normally bill on a non-contingent basis without adjustment for results obtained. Second, the Court must decide how much it should adjust this minimum figure in view of the particular facts of the litigation relevant to the traditional elements encompassed within the concepts of "risk" and "quality of work".

A. The Minimum Value Of Petitioner's Services Herein Based Upon Time Expended And Standard Hourly Billing Rates

Attorneys employed by Petitioner, a professional association, expended a total of 3577.75 hours in connection with this litigation through October 9, 1975. Additionally, paraprofessionals employed by Petitioner expended 5918.60 hours on this litigation, entirely on discovery matters and settlement administration. Exhibit "H", attached to the Affidavit of H. Laddie Montague, Esq. dated October 28, 1975 submitted by Petitioner, gives a detailed breakdown of the total amount of time expended by each attorney in connection with each of eleven separate categories of legal activity.[6]

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6. A detailed description of the records supporting the hours listed therein, as well as the manner in which time was computed where contemporaneous records were unavailable, is contained in the attached Affidavit of H. Laddie Montague, Esq. dated October 28, 1975 (¶¶ 1-18) and the Affidavit of Herbert B. Newberg dated October 9, 1975. As stated in Mr. Montague's affidavit (at ¶5 et seq.) fee awards have been made recently to Petitioner by District Courts expressly

In its opinion herein, the Court of Appeals gave no controlling direction as to the actual categories to be utilized in breaking down the amount of time expended by each attorney on different types of activity.[7] Subsequent to the Courts of Appeals' decisions in Lindy, supra, and Grinnell, supra, different courts have used slightly different categories in different cases, and even different categories among different petitioning firms in the same case when the petitions reflected varying breakdowns. The categories utilized by Petitioner herein correspond to those generally used in setting counsel fees and provide a rational basis for analyzing the nature of the work done by Petitioner's attorneys.[8] The type of actual legal

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following the standards set out by the Third Circuit in Lindy, supra, and the Second Circuit in Grinnell, supra, in which Petitioner's proposed findings on time expenditures, based upon similar records and reconstructions, have been accepted in toto. Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 382 F.Supp. 999,1011 (E.D. Pa. 1974); In re International House of Pancakes Franchise Litigation, supra (Order Awarding Attorney Fees dated July 11, 1975 and Exhibit to Petition of David Berger, P.A. entitled "Hours and Hourly Rates - David Berger, P.A. - International House of Pancakes Litigation").

7. The Court mentioned, without elaboration, the categories of ". . .discovery, oral argument, negotiation. . ." 495 F.2d at 471. Similarly, in Lindy, supra, the Third Circuit only mentioned "pretrial discovery" and "settlement negotiations". 487 F.2d at 167.

8. The total time expended by Petitioner's attorneys as a group broken down by each relevant category of activity are as follows:

activity included within each such category is explained in detail in Mr. Montague's affidavit (¶9). The evidence in the record in this case relating to the types of legal activity engaged in by each attorney is more detailed than the information before the court, or relied upon by the court, in the recent major antitrust cases where a District Court has had significant leeway in adding to the basic value of lead counsel's time in view of the risks, quality and substantive as opposed to ministerial nature of the actual time expended by lead counsel.[9]

In setting the standard hourly billing rates applicable to each of the attorneys employed by Petitioner, the District Court, as stated by the Third Circuit in Lindy, supra at 169, can rely upon its own expertise and knowledge as to the normal

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	Hours
(a) Pleadings and motions	32.80
(b) Discovery	173.00
(c) Court appearances and preparation	282.75
(d) Settlement negotiations	244.50
(e) Settlement procedures	400.25
(f) Settlement administration	1349.60
(g) Fee application	194.25
(h) Briefs and legal research	502.50
(i) Appellate proceedings after Final Judgment	236.75
(j) General	154.85
(k) Fee agreements and interventions	10.00
Total	3577.75

billing rates that would be currently charged on an hourly basis for attorneys of like skill, experience and standing in this District.[10]

Mr. Montague's affidavit (¶¶19-35) details the personal career histories and experience of each of Petitioner's attorneys involved in this litigation. There can be no serious question that Petitioner and its attorneys, particularly the three senior counsel (David Berger, H. Laddie Montague, and Herbert B. Newberg) who expended nearly 2700 of the over 3400 attorneys' hours already devoted to this litigation, are today - and were throughout this case - among a handful of the nation's most experienced, well-known and successful plaintiffs' antitrust lawyers. Furthermore, the status of Petitioner, and of the senior attorneys who put in the bulk of the work in this litigation, has been repeatedly recognized by the federal courts.[11]

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9. For example, see Arenson, supra, at 1354-1355; Doughboy, supra, at 67,030-67,031; In re Gypsum, supra, at 966. Virtually identical categories were utilized in setting Petitioner's fees on the remand hearing in Lindy, supra, 382 F.Supp. at 1005.

10. In TWA v. Hughes, supra, decided in 1970, this Court held that a proper "mixed rate" on a non-contingent hourly basis for an experienced antitrust firm in this District (coincidentally, the same firm that acted as lead counsel for defendants herein in opposition to Petitioner), where almost two-thirds of the time was expended by associates and when the litigation itself commenced in 1961, was $75 per hour. 312 F.Supp. at 484.

As is clear from the record, Petitioner's legal practice, both currently and throughout the course of this litigation, has primarily involved antitrust plaintiff and class action work throughout the United States in various federal jurisdictions. Virtually all of Petitioner's work is done, and has been done, on a purely contingent fee basis dependent upon results. Thus, Petitioner has no direct experience in actual hourly billing rates applicable to each of its attorneys.

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11. Lindy Bros. Builders, supra, 382 F.Supp. at 1010-11, 1020-22; Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557, 559 (E.D. Pa. 1969); Professional Adjusting Systems of America, Inc. v. General Adjusting Bureau, 352 F.Supp. 648, 651 (E.D. Pa. 1972).

Recently, on the remand in the International House of Pancakes Litigation, supra, Judge Collinson said:

> "As stated in the opinion of the Court of Appeals, Mr. David Berger has a national reputation in the field of anti-trust class litigation and this Court has found the services of Mr. Berger and his associates in this litigation to be of the highest quality." (Order Awarding Attorney Fees dated July 11, 1975, at p. 2)

In determining Petitioner's fee therein, Judge Collinson utilized "standard hourly rates" of $200 per hour for Mr. Berger and $100 per hour each for Mr. Newberg and Mr. Montague for all time expended since the commencement of the litigation in 1970.

The status of Petitioner's attorneys involved in this case was noted even by Mr. Sondericker, counsel for one of the defendants, in opposing earlier an award of $2.5 million to Petitioner. (Transcript of Hearing of June

The hourly rates for each of Petitioner's attorneys set forth in Exhibit "I" to Mr. Montague's affidavit[12] reflect reasonable, if not conservative, estimates of the average standard hourly rates that would be billed, without reference to later premiums for contingencies and results achieved, by experienced antitrust

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5, 1972 at pp. 84-85).

12. The billing rates listed on Exhibit "I" are as follows:

		Year Admitted
David Berger	125.00	(1938)
Herbert B. Newberg	100.00	(1962)
H. Laddie Montague	100.00	(1964)
Harold Berger	100.00	(1952)
Prof. Alexander Frey	100.00	(1921)
Warren D. Mulloy	100.00	(1955)
Leonard Barrack	75.00	(1969)
Joseph R. Lally	75.00	(1969)
Bruce K. Cohen	60.00	(1972)
Joel C. Meredith	70.00	(1970)
Gerald R. Rodos	60.00	(1971)
Alan M. Lerner	85.00	(1966)
Merrill G. Davidoff	50.00	(1973)
Barry N. Shaw	85.00	(1966)
Earl D. Greenburg	60.00	(1971)
Pauline C. Cohen	85.00	(1966)
Howard L. Schambelan	85.00	(1965)

firms in this District for attorneys of like skill and experience performing the same services done herein.[13] In addition, these

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13. In the earlier proceedings herein, Mr. Simon, counsel for Objector-Appellants, argued that $75 per hour represented a proper mixed rate, in the TWA circumstances, in this District for experienced antitrust counsel as of 1965-1966, admitted that some additional "degree of inflation" was necessary in setting standard billing rates for Petitioner's work herein and contended that such a "mixed rate" (plus something for inflation) from this District should be used in setting the starting point in determining Petitioner's fee herein. (Transcript of Hearing of June 5, 1972 at p. 66). Since October, 1965 the Consumer Price Index for the New York City metropolitan area has risen 78%; since the filing of this Court's fee opinion in TWA, supra, in April, 1970 it has risen 44%; since the filing of these actions in July, 1968 it has risen 62%. (See Exhibit "B" attached hereto). At the same hearing, Mr. Reycraft, a well-known experienced antitrust practitioner in this District, and counsel for another Objector, argued that, based on his view of the risk involved, the time of Messrs. Berger, Montague and Newberg since the commencement of the litigation should be charged at $150 per hour for all types of work, that all associates' time should be awarded $60 per hour and that all paraprofessional time be given $30 per hour. As a further example of the actual billing practices prevalent in this District even three years ago, this Court should note that Mr. Reycraft argued that the future time expected to be expended on settlement administration subsequent to final settlement approval should be billed at a "mixed rate" of $65 per hour for all time, including that of paraprofessionals and non-legal assistants. (Transcript of Hearing of June 5, 1972 at pp. 80-83).

Similarly, affidavits submitted in the prior proceedings by other Objectors to Petitioner's $2.5 million fee request indicate the applicability of the minimum rates suggested above to Petitioner's work herein. A member of the firm of Botein, Hays, Sklar & Herzberg, based upon his assumption that the settlement itself was unreasonable and should be rejected, argued in an affidavit that in the event the settlement was approved the appropriate "straight time compensation" for "senior attorneys" (Messrs. Berger, Montague and Newberg) should be $150 per hour and that

hourly rates are in line with the standard hourly rates utilized recently by Judges in this District and other Districts in determining awards to securities and antitrust specialists in major class actions.

As a practical matter, the most important hourly rates to be determined herein are those for (a) Messrs. Berger, ($125/hour), Montague ($100/hour) and Newberg ($100/hour) (who expended nearly 80% of the attorneys' time); (b) Mr. Greenberg ($60/hour) (who has about 10% of the attorneys' time) and (c) Judge Harold Berger ($100/hour) and Prof. Frey ($100/hour) (who have approximately 5% of the attorneys' time). These rates are easily supported by the recent cases which have set fees in litigations conducted roughly throughout the same period.[14]

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straight charges for junior attorneys should be $60 per hour. Based upon what he deemed an unreasonable recovery and little compensation for contingency, he argued that the above "straight time" charges should be increased by only 50% (Affidavit of Nathaniel Whitehorn dated May 12, 1972). A partner in the firm of Clare & Whitehead, counsel for other claimant-objectors to Petitioner's prior fee request, submitted an affidavit stating that applicable "standard rates" herein would be $100 per hour for the "senior attorneys", $50 per hour for the "associate attorneys" and $25 per hour for the paraprofessionals. He also argued that all future time should be charged at the same rates. Based upon his view that the results herein were poor, he contended that only a small premium should be added to the above standard rates. (Affidavit of Bradford P. Colcord dated May 12, 1972).

14. For a roughly comparable period in the International House of Pancakes Litigation, Judge Collinson, as noted, set hourly rates of $200 per hour for Mr. Berger and $100 per hour

For example, in Benerofe v. Bartlett, 70 Civ. 3415 (Memorandum and Order of July 30, 1975, S.D.N.Y. and Exhibit "A" to Affidavit of Lawrence Milberg dated July 15, 1975), Judge Knapp utilized the following base rates in awarding over $450,000 in fees in a securities class action for all time since the commencement of the litigation in 1970:

	Hourly Rate	Year Admitted
Melvyn Weiss	$125	1960
Lawrence Milberg	$125	1937
Jared Specthrie	$100	1965
David Bershad	$100	1965
Harold Morrow	$ 75	1966
Paul Tullman	$ 75	1962

In Blank v. Talley Industries, Inc., 70 Civ. 4144 (S.D.N.Y., Opinion dated Jan. 14, 1975), Judge Weinfeld established flat rates of $100 per hour for all partners and $50 per hour for all associates (at p. 10) in determining counsel fees of $1,395,600 in a securities class action begun in 1970.

In Gypsum, supra, Judge Zirpoli also used flat rates of $100 per hour for all partners' time, and $50 per hour for

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each for Messrs. Montague and Newberg. In the Lindy, supra, remand, Judge Harvey used rates of $125 for Mr. Berger and $70 each for Mr. Montague and Mr. Newberg. But that litigation commenced in 1966 rather than 1968, and the bulk of the time Messrs. Newberg and Montague expended in Lindy, supra, was put in substantially earlier than the time they expended in this litigation. See Mr. Montague's Affidavit (¶38).

all associates' time, and $15 per hour for all paraprofessional time for the numerous petitioning counsel in that complex antitrust litigation which commenced in 1967. Similarly, Judge Lord, for the 16 petitioning sets of counsel, in Doughboy, supra, which commenced in 1968, used flat rates of $100 per hour for partners' time, $40 per hour for associates' time and $20 per hour for paraprofessional time. The Court also assigned a pre-risk hourly rate to settlement negotiation time of $200 per hour.

In Arenson, supra, begun in early 1971, Judge Bauer established basic hourly rates of $100 per hour and $125 per hour for the senior antitrust lawyers who accounted for over two-thirds of the attorneys' time expended on the case. The Court adopted rates ranging from $35 per hour to $80 per hour for the remaining attorneys. A number of the attorneys for whom the courts in Arenson, supra; Gypsum, supra; and Doughboy, supra used standard hourly rates of $100 per hour were of the approximate levels of experience of Messrs. Montague and Newberg herein. For example, the following attorneys, admitted to practice in the years listed (according to the 1975 edition of the Martindale-Hubbell Law Directory), were awarded standard hourly rates of $100 for all time spent on the respective litigations:

Doughboy, supra:

Donald Barry	(1965)
Douglas Rigler	(1963)
Kenton Granger	(1962)
Odes Stroupe	(1971)

Gypsum, supra:

John H. Boone	(1963)
Samuel H. Seymour	(1962)
William E. Barnard	(1961)
Lee A. Freeman, Jr.	(1966)
John Edward Burke	(1964)
David L. Creskoff	(1963)
Mikael B. Lewiston	(1961)
Frederick B. Steinhardt	(1966 - year of law school graduation)

Arenson; supra:

Perry Goldberg	(1960 - year of law school graduation)

Given the nature of Petitioner's practice and the fact that firms that employ standard hourly rates often add bonuses or premiums dependent upon results, there is simply no foolproof method for determining an exact hourly rate applicable to each of Petitioner's attorneys. But the rates suggested are certainly within the range of rates (a) recently

used by experienced District Judges and (b) known by this Court to reflect actual billing practices by experienced antitrust firms both here and in other jurisdictions that are centers of antitrust litigation and practice.[15] Most importantly, the rates suggested for Messrs. Berger, Montague and Newberg are reasonable. These three attorneys not only have participated in many of the most significant and successful private treble damage actions of the last decade, but in many of such cases were lead counsel.

Based upon the number of hours expended by all Petitioner's attorneys in each category of activity multiplied by the proposed standard hourly rates applicable to each of Petitioner's attorneys, the minimum value of the time expended by Petitioner's attorneys, prior to any adjustment for risk or quality of work, is as follows:

Category	Attorney Hours	Minimum Value Based Upon Standard Hourly Rates
(a) Pleadings and motions	32.80	$ 3,130.00

15. Some District Courts, in cases involving awards to a large number of firms with dozens of attorneys, have adopted the practice of setting flat rates for all partners and associates regardless of experience (For e.g., Gypsum, supra; Doughboy, supra). In reality, Judge Bauer's approach in Arenson, supra, of using varying rates reflecting levels of experience is in accord, as this Court knows, with actual billing practices in this District.

(b)	Discovery	173.00	16,911.00
(c)	Court appearances and preparation	282.75	31,600.00
(d)	Settlement negotiations	244.50	25,737.50
(e)	Settlement procedures	396.75	41,262.50
(f)	Settlement administration	1349.60	120,063.50
(g)	Fee application	194.25	19,692.50
(h)	Briefs and legal research	502.50	50,930.00
(i)	Appellate proceedings after Final Judgment	236.75	26,237.50
(j)	General	154.85	16,211.25
(k)	Fee agreements and interventions	10.00	1,000.00
	Total	3577.75	$352,765.75

A complete breakdown of the "hourly rate value" of each attorney's time by each category of activity is given in Exhibit "A" attached to this brief.

Additionally, Petitioner has employed paraprofessionals who have expended 5918.60 hours through October 9, 1975 on discovery and settlement administration matters herein. The bulk of this time involved expenses incurred by Petitioner prior to final approval of the settlement by the Court of Appeals. The personal histories of the paraprofessionals that worked on this litigation are included in Mr. Montague's affidavit (¶35).

Petitioner's calculated costs for employing such paraprofessionals has been over $9 per hour (Montague affidavit, ¶39). At this hourly rate, Petitioner's accrued costs for paraprofessional work in this litigation amount to

$53,267.40. In accord with the Court of Appeals opinion, this amount, as well as any future expenditures for paraprofessional services, is to be reimbursed to Petitioner from the settlement fund.

Similarly, Petitioner employed the services of Heffler & Company, C.P.A., professional accountants, in connection with settlement administration activities prior to final approval of the settlement. Such accountants expended 1653 hours in connection with this litigation at a cost to Petitioner of $27,505 (Montague affidavit, ¶7). These costs have not yet been reimbursed.

Petitioner has estimated that approximately 400 hours of attorneys' time and 750 hours of paraprofessional time will still be expended (subsequent to the October 9, 1975 cut-off date in Exhibit H) to conclude this litigation (Montague affidavit, ¶7). The attorneys' time will be devoted to settlement administration matters and to the instant fee petition proceedings and will involve the services of senior counsel and experienced associates. Petitioner suggests that the Court enter an order at this time prospectively awarding $85 per hour for future attorneys time and $10 per hour for future paraprofessional time to be applied to the actual number of hours expended, based upon an affidavit submitted to the Court by Petitioner 30 days prior to the final disbursement to the

class, with such hours to be subject to approval by the Court.

B. The Adjustment Of The Minimum Value of Petitioner's Time Resulting From The Risk Of Litigation And the Quality And Results Of Petitioner's Work

There are no certain guidelines listing all the conceivable elements included within the concepts of risk of litigation and the quality of an attorney's work that establish the appropriate emphasis in any case, particularly large and complex antitrust class actions. Similarly, there are no magical formulas that can allow a reviewing Court to adjust the minimum hourly rate value of Petitioner's work with mathematical precision. Yet, with slightly different formulations, the various federal courts that have recently determined fee awards are in agreement as to the factors a court should look to in analyzing risk and quality of work; and the courts that have awarded fees, post Grinnell, supra, in major antitrust class actions have devised rough mathematical guidelines or multiples for adjusting class counsel's fees to reflect the risks, quality and results in such suits. The remainder of this brief will examine those factors relevant to analyzing risk and quality as they apply to this suit and then, through analysis of recent antitrust class action fee awards, establish what appropriate multiples apply to the minimum hourly rate value of Petitioner's work herein.

1. The Risks in Successfully Prosecuting These National Class Actions Were Substantial And The Quality and Final Results of Petitioner's Work Were Outstanding

In reality, an analysis of the risks of litigation and the quality of the attorneys' work requires examination of a number of overlapping elements. The recent cases involving fee awards in complex antitrust class actions generally break down risk and quality into the following factors:

(a) The benefits of a prior decree in a government action;

(b) The magnitude and complexity of the litigation and the risk of success on the major issues in the case;

(c) The responsibility undertaken by petitioning counsel in light of collateral lawsuits;

(d) The financial risks to petitioning counsel in light of fee arrangements with clients;

(e) The amount recovered;

(f) The amount that would normally be charged to a victorious plaintiff; and,

(g) The standing of opposing counsel.

As to all of the above elements, the record evidence in this case is very clear. On the most important of the above factors - the benefit of the prior government case, the risks involved on the merits, and the significance of the amount recovered - the Court of Appeals itself has already made detailed

findings in affirming this Court's extensive opinion approving the settlement.[16] On the other elements the evidence submitted by Petitioner and within this Court's knowledge establishes that the relevant facts are both clear and uncontradicted.

(a) The benefits of a prior governmental proceeding

The Court of Appeals has already held that the national subscriber class actions herein were not benefited by the prior government civil action against the defendants. In fact, the Court of Appeals opinion held the opposite, finding that the substantive case for the national subscriber classes, as well as the argument for class certification itself, was seriously injured by the government action. 495 F.2d at 455-57.

The national class actions herein developed out of the civil injunctive action brought by the United States v. Grinnell Corp., et al. (D.R.I. Civ. 2785). As the Court of Appeals found herein, the government case was directed primarily to the charge of monopolization under §2, supported by evidence of predatory pricing in cities where the defendants experienced competition. 495 F.2d at 455-57. The trial was held in June,

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16. In fact, the Court of Appeals held that this Court had already, on the basis of sufficient evidence, correctly analyzed the risks of the litigation and the significance of the recovery. 495 F.2d at 462-63.

1964, before Honorable Charles E. Wyzanski, sitting by designation. The government presented no evidence relating to the activities of the defendants after 1961. On November 27, 1964, Judge Wyzanski filed an opinion finding violations of §§1 and 2 of the Sherman Act, United States v. Grinnell Corp., 236 F.Supp. 244 (D.R.I. 1964), and entered a decree. The government appealed on the relief granted and the defendants appealed on the finding of liability and the fairness of the trial.

On June 13, 1966, the Supreme Court, in a six-to-three decision, affirmed the District Court in part, reversed in part, and remanded for further hearings on relief. 384 U.S. 563. The remand directed that the District Court consider divestiture of the assets of defendant ADT, which had been found to have 73% of the accredited central station business nationwide, on a city-by-city basis (Ibid, at pp. 577-578). The remand also directed consideration of localized relief in each of the cities in which defendants operated. Justice Douglas, writing for the majority, conceded that a localized market analysis could show that some cities, where the defendants faced no "competition," might not support more than one accredited central station. In at least 20 of the cities in which the defendants had no competition from other "accredited central stations," the relevant service market, they were found tc have been losing money because of "fringe competition." Justice Fortas, joined

by Justice Stewart, dissented on the grounds that the monopolization findings, the basis of the government's case, rested upon illogical and unrealistic definitions of both the relevant service and geographic markets delineated by the lower court. Justice Harlan also dissented on the issue of the relevant service market definition and likewise noted that while a national market might be found for §2 injunctive purposes, "...immediate competition takes place only within individual communities...." (Ibid, at pp. 583-584).

After over a year of extensive further documentation, depositions, negotiations and hearings, Judge Wyzanski entered a final decree on July 11, 1967. Aside from generalized injunctive relief, including a prohibition against predatory pricing "at unreasonably low charges" (§V[B]), the final decree directed varying amounts of divestiture of the assets by ADT, but only in 21 of the 115 cities ADT served, and directed other relief relating to the offering of contracts by ADT to competitors in only five cities. The government case and decree only covered the period from 1957 until 1961 and was of no value for the additional seven and a quarter year period covered by the class complaints herein in establishing liability.

The Court of Appeals found that, unlike numerous antitrust class suits following successful government actions, the liability of defendants herein was not prima facie

established by the prior government civil injunctive action 495 F.2d at 455-57. To the contrary, as the Court of Appeals found, the national subscriber classes were seriously hindered by the government case:

> "The government's victory was in large part predicated on defendants' predatory price-cutting practices which, according to the Court, demonstrated the existence of both monopoly power and an intent to destroy competition. These findings are of dubious value to the class plaintiffs in the present actions. No questions with respect to any injury to subscribers were either put in issue or determined in the government action. In fact the basis for the government decree was adverse to the interests of the subscriber-plaintiffs, in so far as these plaintiffs, in order to obtain monetary relief, have to prove that the monopolization resulted in artificially inflated prices." 495 F.2d 455-56.

The Court of Appeals' findings concerning the different liability and damage considerations present in different locales, as established by the government case, also demonstrate the resultant difficulties facing Petitioner in sustaining the class certification argument for national classes. 495 F.2d at 453, 457.

(b) The risks of successful prosecution in light of the magnitude and complexity of the litigation

Even in proceedings subsequent to a relevant and beneficial government case, the prosecution of national "consumer" class actions inherently involves issues of great magnitude and complexity. This is especially true when, as

here, defendants are represented by experienced counsel prone to fully litigate with every conceivable defense and tactic.

Yet, as shown by the Court of Appeals' opinion itself and the undisputed underlying facts, the national subscribers class actions herein had far more substantial risks involved in attaining any significant ultimate recovery than in other major antitrust class actions to which comparison can be made. On all four significant issues facing Petitioner in prosecuting these actions - liability, impact, damage and national class certification - there were, as the Court of Appeals found, "...substantial roadblocks stand[ing] in the way of any ultimate victory for plaintiffs on the merits." 495 F.2d at 457. There was a considerable risk that even if the national subscriber class action had been certified and successfully litigated through trial that plaintiffs would have recovered nothing at all.

The decree in the government action and the evidence adduced therein, as already shown, were at best of no benefit to the subscriber classes and at worst a substantial detriment on all major issues of contention.

The defendants intended to relitigate the issue of liability and it would have been difficult to sustain the same relevant service and geographic markets in a national subscriber class action for damages that the Supreme Court upheld in the

government suit for injunctive relief. Three members of the Supreme Court had dissented on the market definition issues in the government case, and the majority's opinion on relief indicated the majority recognized that the real markets involved were not those it was willing to sustain for purposes of liability in an injunctive proceeding. The proper definition of markets would vary from city to city. Defendants' relevant activities varied from city to city. Costs and prices varied from city to city to such an extent that the evidence in the government case showed that ADT deviated from its minimum base rates 99% of the time and that even in 20 cities where defendants had a "monopoly" they were losing money. In view of these facts, the Court of Appeals held that the basic monopolization charge was "...still open to attack" and that defendants in a new trial "...might well carry the day..." on the liability issue. 495 F.2d at 456.

Proving impact and damages for national subscriber classes was even more difficult, as the Court of Appeals itself found. The government's case was based on predatory pricing in competitive cities and conduct in monopoly cities designed to deter entry. Thus it was possible that the only persons injured by the defendants' conduct were the competitors who were driven out of business or deterred from expanding their operations. In a predatory pricing case customers are benefited, not injured, by the lower prices involved. That this is what

most likely occurred in the Grinnell situation is indicated by the fact that the defendants paid $12 million to settle the competitor suits before settling a single subscriber action and that David Shapiro, counsel for a group of competitors who had previously settled their suits against defendants for $6,000,000, filed an affidavit in the prior settlement fee hearing stating that based on his analysis of the record in the Grinnell proceedings the subscribers suffered no damages at all. The language of the Court of Appeals on this point perhaps best sums up the problems of proving damages to the majority of subscriber class members:

> Even if the relitigation of the market issues does not succeed in overturning the basic finding of monopolization, it would almost inevitably affect the proof of impact and damages. It appears that the majority of claimants may well be subscribers in "competitive cities", i.e., cities where prices were low and alternative services were open to subscribers. Of the more than 14,000 claims, over 8,800 are apparently from competitive cities, representing approximately sixty-two percent of the total transactions reflected in the claims that have been submitted. 495 F.2d at 457.

Finally, the Court of Appeals held that if Petitioner had not achieved the settlement subsequently approved that "...there would have been a serious question as to whether these actions could have been maintained as class actions at all." 495 F.2d at 457. The Court of Appeals summarized and approved this Court's findirgs concerning the difficulty of sustaining national class certification:

> In its approval of the settlement offer the District Court outlined some of the factors which militate against the use of the class action device. The separate liability and damage issues present enormous difficulties. There are different competitive climates in each of the locales involved. All the members of a class did not contract for the same services even in the same city. In addition, a substantial administrative burden could have resulted from approval of the class actions urged in this case. The District Court estimated that, at an absolute minimum, the separate liability and damage issues would take at least five years to try. Such necessitous judicial delays and the resulting uncertainty in outcome were all factors which would weigh strongly in any decision to accept a settlement. 495 F.2d at 457.

In addition to these problems, Petitioner faced two separate statute of limitations questions. First, there was the statute of limitations issue relating to the end of the tolling period which was fully litigated to the Supreme Court. Second, defendants intended to contest the right of non-litigating class members to rely upon the class suit to avoid the statute of limitations without actual proof by each class member of reliance on the filing of said suit.

Perhaps the most significant evidence of the risks of attaining any ultimate recovery for the national subscriber classes is that although over fifty-four other subscriber actions were filed by numerous other experienced antitrust counsel, none of these firms attempted to represent a subscriber class of any size except for three statewide actions filed subsequent to Petitioner's complaints.

(c) The responsibility undertaken by Petitioner

This litigation is a unique example of a major antitrust class action, litigated for over seven years, in which a single law firm successfully represented national classes. Although in this, as in all multidistrict litigation, various counsel shared some of the ongoing work required on behalf of all plaintiffs, no other firm was willing to assume the responsibility for representing national classes. Petitioner alone filed national class complaints, prepared the substantive cases for the classes, moved for class certification, negotiated the class settlements, sought and secured settlement approval in this Court and the Court of Appeals and administered the settlement. As recognized by the Court of Appeals, this was not a responsibility easily and quickly discharged:

> "The settlement in the case at hand was not negotiated in the early stages of the dispute. . . . No other representative surfaced until after the settlement agreement was reached and widely publicized. Thus, this is not a situation, such as that involved in Ace Heating & Plumbing Co., Inc. v. Crane Co., supra, where several different counsel were vying for recognition as class representatives. . . ." 495 F.2d at 465.

By any method of analysis, Petitioner undertook and successfully carried out, alone for over seven years, an extraordinary amount of responsibility in these cases even when compared with the

degrees of responsibility normally assumed by large groups of counsel in multi-district class actions.

(d) The financial risks to Petitioner in prosecuting these actions

All of Petitioner's fee contracts with clients in these cases are purely contingent contracts based upon the amount of ultimate recovery. Although Petitioner began this litigation over seven years ago, negotiated a $10 million plus interest settlement over four years ago, and secured final approval of the settlement over eighteen months ago in the Court of Appeals, it has not received any fees or reimbursement for its services from any client or from any Court. It has incurred substantial litigation costs for over seven years, including expenses for accountants, paraprofessionals and general settlement administration overhead for which it has still been only partially reimbursed out of the settlement fund. For a firm the size of Petitioner, which engages primarily in contingency work and which has had to absorb throughout the same period the costs, including substantial amounts of uncompensated attorneys' time, of unsuccessful litigations, the personal financial risks and delays herein have been significant.

Furthermore, the individual risks to Petitioner have been particularly acute in this case because of the costs and delay in securing any fee award at all. Petitioner has had to deal with claims made against its future fee award on the

part of firms that represented individual plaintiffs and claimants, as well as to absorb the costs of hiring separate counsel to engage in extensive litigation over fee standards with a few large corporate claimants interested in curtailing fee awards as a general defensive strategy in other actual and prospective litigations.

(e) The significance of the amount recovered

As of October 23, 1975, the total settlement fund herein, with accrued interest, amounted to approximately $12,200,000. Given the facts in this case, that settlement is extraordinary both in itself and when compared to settlements in other major antitrust class actions.

Petitioner did not have the relative luxury of prosecuting a price-fixing case following a government suit. In the price-fixing situation, obtaining class certification is far more certain, and the existence of some damages follows from the proof of liability. Here, even assuming Petitioner could fully and successfully overcome both statute of limitations issues, establish workable market definitions, get three national classes certified, and prove liability, there would still have been a strong chance of no recovery. For the nearly 60% of claimants who were in cities where predatory pricing had taken place, as well as for claimants who were in monopoly cities where defendants were losing money, the possibility of proving

damages was minimal. In the light of that situation, the $12 million recovery was exceptional.

One indication of the value of that recovery is the testimony offered by the economic expert of the claimants who appealed the settlement judgment. The expert estimated an optimum recovery after a fully successful trial of 3% to 7% of total billings. In the face of the risks discussed above, Petitioner negotiated a settlement constituting approximately 3 1/2% of billings of claimants over an 11 1/4 year period, or approximately 10% of billings against the normal four-year settlement or statute of limitations period. Even assuming that Petitioner was fully successful at trial on overcoming all the hurdles on liability, impact and class certification, the Court of Appeals held that this settlement ". . .was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced." 495 F.2d at 458.

Another indication of the outstanding nature of the settlement is that it compares favorably with settlements in several recent price-fixing class actions in which, as already indicated, class certification as well as proof of liability impact and damages would have been much simpler than in the present case. The recovery in the instant cases of approximately 10% of approved purchases over a four-year period is clearly

approximately 1% of total sales. In comparison, the results here, where Mr. Shapiro's affidavit states that subscribers did not suffer any damages, are not merely good, but outstanding. The settlement is even more extraordinary when it is considered that the same defendants had already paid out $12 million, or approximately 4 1/2% of total billings, to competitors.

The settlement is also outstanding in view of the time period and the scope of the classes involved. The classes are so broadly defined that the only parties excluded were governmental entities above the state level, individual homeowners and the three state classes. Although most antitrust class actions have been settled for a four-year period,[17] the present settlement covers all members of the classes for an 11 1/4 year period. Due to these provisions of the settlement, over 14,000 claimants are participating in the $12,100,000 Settlement Fund.

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17. See, e.g., City of Philadelphia v. Interpace Corp., supra (Concrete Pipe); City of Philadelphia v. General Host Corp., supra (Bakery Products); Philadelphia Housing Authority v. American Radiator and Sanitary Corp., supra (Plumbing Fixtures); City of Philadelphia v. Morton Salt Co., 248 F.Supp. 506 (E.D. Pa. 1965) (Rock Salt); School District of Philadelphia v. Harper & Row Publishers, Inc., supra (Library Books); Regal-Tyson, Inc. v. Globe Ticket Co., (E.D. Pa., C.A. No. 43221) (Tickets).

(f) The amount that would normally be charged to a victorious plaintiff

The total amount of fees requested by Petitioner for legal services through October 9, 1975 - approximately $1,250,000- constitutes about 12.5% of the initial settlement and only about 10% of the fund plus accumulation interest. Viewed in relation to the amounts that experienced antitrust counsel would normally charge for a $10 million to $12 million recovery litigated on a purely contingent basis, the total fees requested by Petitioner are quite modest.

As shown by the record herein and facts within this Court's knowledge, fees in antitrust actions litigated on a contingency basis are normally contracted for, and charged at, approximately 20% to 40% of recovery.[18] This reflects the

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18. See Arenson, supra at p. 1357. In Norte & Company v. Huffines, 62 Civ. 3390 (S.D.N.Y. 1970) (Transcript of Hearing of Oct. 16, 1970), then District Judge Mansfield, in awarding counsel fees of $1.0 million from a $4.2 million fund created in a derivative action, noted that the resultant percentage fee of 24% was what would be ". . . normally expected at the conclusion of a contingency suit that has been successful." (at p. 8). In Hanover Shoe, supra, 245 F.Supp. at 304-305, the District Court noted that the actual fee agreement between plaintiff and its counsel (the Donovan, Leisure firm) provided for the payment of small ongoing hourly rate charges with a contingent fee of 20% of the final recovery. See also see Farmington Dowel Products Co. v. Forster Manufacturing Co., Inc., 421 F.2d 61 (1st Cir. 1969) and 436 F.2d 699 (1st Cir. 1970).

evidence as to Petitioner's fee arrangements herein, and in Lindy, supra, as well as the experience in Philadelphia Electric Co. v. Anaconda, supra, where after the negotiation of the settlement virtually all class claimants entered into fee contracts with Petitioner and his co-counsel agreeing to pay fees of 25% of their respective recoveries (at p. 559). In Alpine Pharmacy, supra, our Court of Appeals, citing standard authorities on percentage awards, held that an award of nearly $2.0 million was not excessive in relation to either the total $12.5 million recovery or the $9.5 million "interest" segment of that total fund and that such an award was well within the range of fees awarded in antitrust actions undertaken on a contingent fee basis. 481 F.2d at 1052-53.

(g) The standing of opposing counsel

There has been no dispute herein that the standing of counsel opposing Petitioner was very high. All defendants were represented by experienced and well-known antitrust firms that had been litigating these matters since the commencement of the government suits in 1961. They had shown their willingness to fully litigate every significant issue in the case, even through the Supreme Court. In fact, in TWA, supra, this Court itself acknowledged the high standing of counsel for defendants herein.

Based upon a detailed application of both prior findings and uncontestable underlying facts as to each of the elements relevant to an analysis of the risks of litigation and quality of Petitioner's work herein, it is clear that this Court should apply to the minimum hourly rate value of Petitioner's time a high multiple for risk and quality appropriate. When a single firm, operating for seven years on a purely contingent basis without compensation, secures a $12 million recovery for national classes in a case where no recovery for any class was the likely result, a substantial fee award is clearly warranted and well within the Court's discretion.

2. The Appropriate Adjustments For Risk of Litigation and Quality of Petitioner's Work Herein In View Of Other Antitrust Class Action Awards

(a) The recent fee awards

The awards made in four major antitrust class actions (Arenson, supra; Doughboy, supra; Gypsum, supra; and Lindy, supra) since the Court of Appeals decision herein provide guidance in determining how much to adjust the minimum hourly rate value of Petitioner's work to compensate for risk and quality of work.

In Arenson, supra, Judge Bauer awarded fees to eight

law firms at four times the hourly rate of all lawyers representing all plaintiffs for all time expended on all types of legal activity. The total fees awarded amounted to $1,339,060 reflecting an average mixed rate award of $386.56 per hour for each of the 3734.5 hours expended by attorneys since commencement of the litigation in 1970. Judge Bauer noted that awards resulting in hourly rates of $400-$500 per hour had been awarded in other recent antitrust class actions conducted on a contingency basis (including Philadelphia v. American Oil, supra) and that such awards reflected reasonable adjustments of hourly rates for contingency. The settlement in Arenson, supra, only involved injunctive relief on fixed commission rates, and no monetary fund for distribution to the class.

In Doughboy, supra, which involved a $38,100,000 settlement of the non-human or agricultural class actions in the antibiotics multidistrict litigation, Judge Lord held that reasonable fees for the 16 sets of petitioning counsel, considering all the factors under Grinnell, supra, would be approximately $16,813,417. The Court noted that most of the petitioning counsel had already received, or would be receiving, awards from other cases involving the same work, and that many also would be receiving substantial fees from retainer clients. In view of these facts, the Court made deductions from the above amount and made actual awards totaling approximately $10,094,017 from the distribution to be made to claimants that did not have fee contracts with counsel.

Judge Lord's extensive and detailed opinion assigns various risk multiples to petitioning firms other than lead counsel for various categories of work for all hours expended since the commencement of the litigation.[19] To lead counsel Judge Lord assigned a basic hourly rate of $100 per hour for all 15,191.25 hours which included work spent on other antibiotics actions before Judge Wyatt. The petition did not break down the hours expended into any specific categories of legal activity. Nevertheless, the Court awarded an across-the-board risk multiple of 3.0 to all time expended on all activities since the beginning of the litigation in 1968. This resulted in a total fee of $4,557,375, or $300 per hour for all time expended. The Court deducted $1,500,000 to reflect the fees already awarded or to be awarded from other actions for the same work, as well as the amounts due from retainer clients.

All paralegal time in Doughboy was given a basic hourly rate value of $20 per hour and was also subject to the same multiples applied to attorneys' time based upon the applicable

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19. The multiples ranged from 1 to 2.5, except for "settlement negotiation" time (Category E) where an effective multiple of 4.0 was used since Judge Lord set a basic hourly rate of $200 per hour for all such time of senior attorneys and then multiplied by a risk factor of 2. This category included not only preparation for, and actual, negotiations, but all time seeking settlement approval.

category of activity. Thus, some paraprofessional time was compensated for at a rate of $50 per hour. Even for the large number of non-lead counsel firms, the Court awarded multiples of 2.0 to 2.5 for attorneys' time on categories other than "settlement administration" (1.0) and "other" (1.0), and, as the Court noted, the settlement administration began after final approval of the settlement.

Fee awards in Gypsum, supra, were made to twenty-eight sets of petitioning counsel (representing various classes and class claimants) who shared responsibility for conduct of the litigation over seven years. The fees awarded totaled $9,262,559 (after deductions for previously received retainers and other awards) plus percentage awards from some specific states and entities (such as to the attorney generals). The initial settlement fund amounted to $67 million.

In deciding awards to the five non-lead counsel firms representing class representatives or acting as liaison counsel, the Court applied, in each instance, a different single multiple to all the hours expended by attorneys and paraprofessionals regardless of category of activity. These multiples ranged from 1.75 for two firms to 2.2 for one firm. In making an award to the lead counsel firm for the classes, the Court multiplied all hourly rates for both attorneys and paralegals (at a base rate of $15 per hour) by an across-the-board multiple of 3.0

for all time expended on all categories of activity, including settlement administration, from commencement of the litigation in 1967 up until the final filing of the fee petition, including time expended after final approval of the settlement. Thus, for a total of 14,780 attorneys' hours and 2,893 paraprofessional hours expended through the filing of its fee petition, lead counsel's total reasonable fees were set at $3,988,635, or a mixed rate of approximately $270 per hour (based solely on attorneys' time)[20] for each attorneys' hour expended regardless of type of activity.

On the remand in Lindy, supra, Judge Harvey determined that $554,521.85 was the minimum compensation based solely on time without reference to other factors for 6294.5 hours of attorneys' time expended by co-lead counsel up to the initial fee petition filing on the remand. Petitioners therein had negotiated settlements in price-fixing cases of approximately $24,000,000, following a criminal conviction for price-fixing. In the circumstances therein, Judge Harvey doubled the award for all categories of time, including settlement administration, spent by the attorneys through March 30, 1974, the cut-off date

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20. If one deducted $10 per hour for paraprofessional time, the total award for all attorneys' time would be about $268 per hour.

on the fee petition filing, except for fee application time which was awarded at regular hourly rates. The Court awarded regular rates of $20 per hour on all paraprofessional time. The Court thus increased the amount of the award chargeable against the entire class to $1,134,765.45. Yet this was not the amount the Court ordered paid to co-lead counsel. In determining to utilize a multiple of 2.0 as to most of co-lead counsel's time, Judge Harvey considered the following controlling facts relative to the allocation of the fee: (1) petitioners would already be receiving some $861,191 from the class claimants (representing 18.4% of the total fund) with whom they had fee contracts, and (2) the unrepresented claimants would be responsible for the other 81.6% of the $1,134,765.45 due co-lead counsel from the unrepresented claimants and claimants represented by other counsel - or $925,968.81 - under the allocation formula the Court utilized. Judge Harvey held that petitioners would not be adequately compensated unless the $925,968.61 from the unrepresented claimants was paid counsel, in addition to the $861,191 from their clients. The total fees paid co-lead counsel were, thus, $1,787,159.61, or approximately

$270 per hour on a mixed rate basis for all attorneys' time expended on all legal activities through the fee hearing.[21] The effective multiple thus applied to co-lead counsel's pre-hearing minimum hourly rate value of approximately $550,000 was slightly over 3.0 as to all attorneys' time on all activities.

(b) The appropriate award to Petitioner herein

It would be possible to draw both detailed comparisons and distinctions between the facts relevant to risk and quality in the above cases and those in the instant case - just as one could draw some distinctions and comparisons amongst the four cases themselves. But as a practical matter, these cases (decided by four experienced judges) set the parameters for a fee award to lead counsel in a large antitrust class action like this one - involving a significant multimillion dollar recovery, complex issues, significant risks, and litigated for a lengthy period on a contingent fee basis by experienced antitrust counsel. The awards in such cases, in the view of

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21. As noted, Judge Harvey accepted 6294.5 hours for attorneys' time through March 30, 1975. He added $40,654.00 (without stating the hours) on a regular hourly rate basis for attorneys' time between 3/30/74 and the time of the hearing, and $10,000 for future time. It should also be noted that the award includes an element of $24,704 compensation for paraprofessional time.

the courts that have examined the issues, should run about three to four times the normal hourly charges, reflecting a mixed rate of around $270 to over $400 per hour.

In setting the exact multiples to be utilized herein, several factors are significant in addition to the earlier discussion of risk and quality.

First, Petitioner is not, unlike the above cases, requesting any compensation above cost for paraprofessional and accountant services, the bulk of which were performed prior to final approval of the settlement. Furthermore, the substantial legal costs of securing any fee herein and dealing with collateral claims to its fee has presented Petitioner with significant elements of cost and risk not presented to counsel in other cases.

Secondly, a comparison of the attorneys' hours expended herein in relation to the substantial risks and results involved, as compared with other similar cases, demonstrates that Petitioner has conducted this litigation in an extraordinarily efficient manner without needlessly running up time. The extensive and effective use of paraprofessionals wherever possible, instead of young attorneys, at a low cost to the class, is a procedure which should be encouraged. For example, attorneys' time herein accounts for only about one out of every five settlement administration hours and one out of every six

hours in pre-trial discovery - an indication of the substantive nature of the attorneys' hours actually expended. Such efficiency should not, in effect, be penalized by undervaluing the attorneys' time.

Thirdly, approximately 85% of Petitioner's attorneys' time expended herein, including the large majority of time on settlement administration, occurred prior to final approval of the settlement, which was severely challenged in this Court and the Court of Appeals. Thus, virtually all of Petitioner's time, unlike cases such as Lindy, supra, Gypsum, supra, and Doughboy, supra, where no serious challenges to the final settlements were present and where substantial time on administration was expended after settlement approval, involved "risk" in the real sense of the word.

Finally, this case presents a unique instance where one firm alone assumed responsibility for filing, prosecuting, certifying, settling, and administering a series of major antitrust class actions, and yet was still incredibly successful against odds that dozens of other experienced antitrust counsel apparently thought were hopeless. And, unlike cases involving awards to large groups of counsel, there is no problem here of awarding fees for potentially large amounts of duplicative work. No other firm will file any petition for fees from the settlement fund. If there is any case where a substantial award

is applicable, it is this case.

Petitioner requests, therefore, that the basic hourly rate value of all categories of time heretofore detailed, except for settlement administration, fee application, and fee agreements and interventions, be multiplied by 4.0 to reflect risk of litigation and the quality and results of Petitioner's work. Similarly, it is requested that all settlement administration time be increased by a factor of 3.0; all fee application time (which is limited to time spent by Petitioner through October 9, 1975 and does not include any time spent by Lord, Day & Lord) be increased by a factor of 2.0; and the fee agreement and intervention time be awarded at straight hourly rates, or 1.0. This results in a final valuation in the following amounts:

Category	Minimum Value Based Upon Standard Hourly Rates	Multiple
(a) Pleadings and motions	$ 3,130.00	4.0
(b) Discovery	16,901.00	4.0
(c) Court appearances and preparation	31,600.00	4.0
(d) Settlement negotiations	25,737.50	4.0
(e) Settlement procedures	41,262.50	4.0
(f) Settlement administration	120,063.50	3.0
(g) Fee application	19,692.50	2.0
(h) Briefs and legal research	50,930.00	4.0
(i) Appellate proceedings after Final Judgment	26,237.50	4.0
(j) General	16,211.25	4.0
(k) Fee agreements and interventions	1,000.00	1.0
	$352,765.75	

Value Based On All Relevant Factors
$ 12,520.00
67,604.00
126,400.00
102,950.00
165,050.00
360,190.50
39,385.00
203,720.00
104,950.00
64,845.00
1,000.00
$1,248,614.50

A total award of $1,248,614.50 would compensate Petitioner at a rate of approximately $349 per hour for all time expended through October 9, 1975 since commencement of the litigation in 1968. This award is approximately 12% of the initial settlement fund and 10% of the final disbursement fund, and represents the only fee award this Court will be required to make from such fund.

Petitioner further requests that this Court reimburse Petitioner for paraprofessional expenses through October 9, 1975 at $9.00 per hour for 5918.60 hours, or a total of $53,267.40 and for the costs of 1653 hours of professional accountants' services in the amount of $27,505.00.

Petitioner also requests that the Court enter an order at this time prospectively awarding Petitioner fees of $85 per hour for all attorneys' time expended by Petitioner on settlement

administration and fee application matters subsequent to October 9, 1975 and up to the final disbursement, and $10 per hour reimbursement for costs for each paraprofessional hour expended during the same period - the time so expended to be approved by the Court upon submission of an affidavit by Petitioner at least 30 days prior to the date of the final disbursement to the class.

Petitioner requests that the Court award out of the disbursements otherwise due its contract clients the same fees pro rata as other class claimants are required to pay out of their recoveries. Petitioner agrees to charge no additional fees to its clients in connection with this litigation.

Respectfully submitted,

LORD, DAY & LORD
Attorneys for Counsel for
Class Representatives
25 Broadway
New York, New York 10004

Of Counsel:

HERBERT BROWNELL
GORDON B. SPIVACK
THOMAS D. BRISLIN

DAVID BERGER, P.A.,
Attorneys At Law
Counsel for Class
Representatives
1622 Locust Street
Philadelphia, Pennsylvania 19103

Of Counsel:

DAVID BERGER
H. LADDIE MONTAGUE

Exhibit A

Valuation of Time Expended By David Berger, P.A. Through October 9, 1975

1. Valuation of total time of attorneys as a group by category of activity:

Category	Hours	Minimum Value Based Upon Standard Hourly Rates	Multiple	Value Based On All Relevant Factors
(a) Pleadings and motions	32.8	$ 3,130.00	4.0	$ 12,520.00
(b) Discovery	173.00	16,901.00	4.0	67,604.00
(c) Court appearances and preparation	282.75	31,600.00	4.0	126,400.00
(d) Settlement negotiations	244.50	25,737.50	4.0	102,950.00
(e) Settlement procedures	400.25	41,262.50	4.0	165,050.00
(f) Settlement administration	1349.60	120,063.50	3.0	360,190.50
(g) Fee Application	194.25	19,692.50	2.0	34,385.00
(h) Briefs and legal research	502.50	50,930.00	4.0	203,720.00
(i) Appellate proceedings after Final Judgment	236.75	26,237.50	4.0	104,950.00
(j) General	154.85	16,211.25	4.0	64,845.00
(k) Fee agreements and interventions	10.00	1,000.00	1.0	1,000.00
TOTAL:	3577.75	$352,765.75		$1,248,614.50

2. Minimum value of total time spent by each attorney as to each category of activity based upon standard hourly rates:

Category	Hours	Minimum Value Based Upon Standard Hourly Rates
(a) Pleadings and motions		
H.L. Montague	6.8	$ 680
Herbert B. Newberg	16	1,600
H.L. Schambelan	10	850
TOTAL:	32.8	$3,130

Category	Hours	Minimum Value Based Upon Standard Hourly Rates
(b) Discovery		
David Berger	12	$ 1,500
H.L. Montague	67.9	6,790
Herbert B. Newberg	46.5	4,650
A.L. Lerner	23.5	1,997.50
H.L. Schambelan	23.1	1,963.50
TOTAL:	173	$16,901.00
(c) Court appearances and preparation		
David Berger	133	$16,625
H.L. Montague	128.25	12,825
Herbert B. Newberg	11.5	1,150
Warren D. Mulloy	10.00	1,000
TOTAL:	282.75	$31,600
(d) Settlement negotiations		
David Berger	51.5	$ 6,437.5
H.L. Montague	39	3,900
Herbert B. Newberg	154.0	15,400
TOTAL:	244.50	$25,737.50
(e) Settlement procedures		
David Berger	63.5	$ 7,937.5
H.L. Montague	165.25	16,525
Herbert B. Newberg	166	16,600
Warren D. Mulloy	2.0	200
TOTAL:	396.75	$41,262.50

906

Category	Hours	Minimum Value Based Upon Standard Hourly Rates
(f) Settlement administration		
David Berger	69.25	$ 8,656.25
H.L. Montague	558.25	55,825
Herbert B. Newberg	56.0	5,600
Harold Berger	76.75	7,675
Prof. Alexander Frey	113.00	11,300
Warren D. Mulloy	1.0	100
H.L. Schambelan	11.35	964.75
J.R. Lally	44.0	3,300
J.C. Meredith	33.25	2,327.50
L. Barrack	4.0	300
E.D. Greenburg	306.75	18,405
G.J. Rodos	34.0	2,040
P.C. Cohen	32.0	2,720
B. Shaw	10.0	850
TOTAL:	1349.60	$120,063.50
(g) Fee applications		
David Berger	27.5	$ 3,437.50
H.L. Montague	152.75	15,275
J.C. Meredith	14.00	980
TOTAL:	194.25	$ 19,692.50
(h) Briefs and legal research		
David Berger	46	$ 5,750
H.L. Montague	268	26,800
Herbert B. Newberg	177.5	17,750
G.J. Rodos	6.5	390
M.G. Davidoff	3.0	150
B.K. Cohen	1.5	90
TOTAL:	502.5	$ 50,968

Category		Hours	Minimum Value Based Upon Standard Hourly Rates
(i) Appellate proceedings after final judgment			
David Berger		102.5	$ 12,812.50
H.L. Montague		134.25	13,425
	TOTAL:	236.75	$ 26,237.50
(j) General			
David Berger		29.05	$ 3,631.25
H.L. Montague		65.05	6,505
Herbert B. Newberg		60.00	6,000
Warren D. Mulloy		.75	75
	TOTAL:	154.85	$ 16,211.25
(k) Fee agreements and interventions			
Herbert B. Newberg		10.0	$ 1,000
	TOTAL:	10.0	$ 1,000
TOTAL (a) through (k):		3577.75	$352,765.75

U.S. DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
WASHINGTON, D.C. 20212

CONSUMER PRICE INDEX FOR URBAN WAGE EARNERS AND CLERICAL WORKERS

NEW YORK, N.Y.-NORTHEASTERN N.J.

ALL ITEMS--SERIES A

(1967 = 100)

YEAR	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.	AVG.
1946	55.5	55.4	55.7	56.4	56.6	57.2	60.8	61.5	63.0	64.5	65.1	65.5	59.7
1947	65.2	65.0	66.4	66.2	65.6	66.2	66.5	67.0	68.3	68.2	69.0	69.6	67.0
1948	70.5	70.3	69.4	70.5	70.8	71.5	72.9	73.2	73.2	72.5	72.4	71.5	71.5
1949	71.5	70.6	70.8	71.2	70.7	70.7	70.8	70.7	71.0	70.3	70.3	69.9	70.7
1950	69.5	69.6	69.7	69.9	70.0	70.3	71.5	71.5	72.4	72.7	73.0	73.9	71.2
1951	74.9	76.1	76.1	76.1	76.5	76.1	76.4	76.2	76.9	77.1	77.6	77.6	76.5
1952	77.6	77.1	76.9	77.3	77.2	77.3	78.3	78.2	78.4	78.4	78.7	78.1	77.7
1953	77.9	77.5	77.6	77.5	77.6	78.1	78.2	78.6	78.9	79.0	78.7	78.8	78.2
1954	78.8	78.7	78.4	78.5	78.7	78.7	79.0	78.8	78.6	78.5	78.6	78.2	78.7
1955	78.3	78.5	78.4	78.3	78.0	78.0	78.1	78.1	78.5	78.4	78.5	78.1	78.2
1956	78.2	78.2	78.2	78.3	78.8	79.3	79.9	79.7	80.3	80.7	80.6	80.6	79.4
1957	80.6	80.8	80.9	81.5	81.8	82.2	82.6	82.4	82.5	82.6	82.7	82.8	82.0
1958	83.7	83.9	84.5	84.5	84.5	84.4	84.5	84.5	84.6	84.7	84.9	84.6	84.5
1959	85.0	84.9	84.9	85.0	85.1	85.5	86.1	85.8	86.1	86.3	86.6	86.6	85.6
1960	86.6	86.7	86.8	87.0	87.1	87.1	87.1	87.4	87.5	87.9	88.2	88.1	87.3
1961	87.9	88.0	87.9	87.7	87.6	87.7	88.2	88.2	88.4	88.5	88.4	88.5	88.1
1962	88.7	89.0	89.0	89.1	88.8	88.9	89.4	89.6	90.2	90.1	90.0	89.8	89.4
1963	90.3	90.4	90.4	90.7	90.6	91.3	91.8	91.8	91.8	91.9	92.2	92.4	91.3
1964	92.2	92.5	92.4	92.5	92.6	92.6	92.9	92.9	93.2	93.2	93.3	93.4	92.8
1965	93.2	93.4	93.4	93.8	93.9	94.3	94.5	94.6	94.9	95.0	95.1	95.4	94.3
1966	96.3	96.0	96.5	96.8	96.8	96.9	97.7	98.1	98.6	99.0	98.9	98.8	97.5
1967	98.7	99.2	99.3	99.3	99.5	99.7	100.1	100.3	100.6	101.0	101.1	101.5	100.0
1968	101.6	102.1	102.6	102.9	103.3	103.9	104.4	105.2	105.8	106.3	106.6	106.9	104.3
1969	107.4	107.8	108.9	109.7	109.9	110.6	111.0	111.3	112.2	112.7	113.1	114.3	110.8
1970	115.1	116.1	116.9	117.7	118.2	119.0	119.4	119.8	120.5	121.2	121.5	122.4	119.0
1971	122.9	123.5	124.3	124.6	125.2	126.1	126.8	126.9	127.3	127.5	127.6	128.0	125.9
1972	128.6	129.6	130.1	130.4	130.7	131.0	131.4	131.7	132.9	133.2	133.3	133.7	131.4
1973	133.8	135.0	136.5	137.5	138.1	139.1	139.2	141.7	142.3	143.1	144.4	145.9	139.7
1974	146.9r	149.2r	151.0r	150.9r	152.6r	153.8r	154.5r	157.0r	158.8r	160.2r	161.0r	161.8r	154.8r
1975	161.9r	163.2	163.4	163.7r	164.3	165,2	166.6	167.5	169.3				
1976													
1977													
1978													
1979													

669

Exhibit "D"

r = revised

10/31

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	:	68 Civ. 4026 (cmm) (E.D. Pa. Civ. 68-1478)
v.	:	
GRINNELL CORPORATION, et al.	:	M 19-92

MANHATTAN-WARD, INC., et al.	:	68 Civ. 4028 (cmm) (E.D. Pa. Civ. 68-1489)
v.	:	
GRINNELL CORPORATION, et al.	:	

1225 VINE STREET BUILDING, INC.	:	68 Civ. 4027 (cmm) (E.D. Pa. Civ. 68-1479)
v.	:	
GRINNELL CORPORATION, et al.	:	

PROPOSED FINDINGS OF FACT

1. Petitioner is David Berger, P.A., Attorney at Law, 1622 Locust Street, Philadelphia, Pennsylvania 19103. Petitioner encompasses its predecessor, then Cohen, Shapiro, Berger, Polisher & Cohen. Petitioner is, and has been throughout these proceedings, sole counsel of record for all the class representatives in the three national class actions established pursuant to Settlement Order No. 1 in Civil Action Nos. 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028. It has petitioned the Court pursuant to Settlement Order No. 1 for an award of counsel fees and reimbursement for out-of-pocket costs,* as counsel for the class representatives in such actions, to be paid proportionately out

* Petitioner has been reimbursed to date for out-of-pocket costs in the amount of $41,122.69. Additional expenses of approximately $24,125 have been paid to others pursant to Court Order.

of the recovery of all claimant class members.

2. The national class actions herein developed out of the civil injunctive action brought by the United States under Sections 1 and 2 of the Sherman Act, United States v. Grinnell Corp. et al. (D.R.I. Civ. 2785). The government case was directed primarily to the charge of monopolization under §2, supported by evidence of predatory pricing in cities where the defendants experienced competition. The trial was held in June, 1964, before Honorable Charles E. Wyzanski, sitting by designation. The government presented no evidence relating to the activities of the defendants after 1961. On November 27, 1964, Judge Wyzanski filed an opinion finding violations of §§1 and 2 of the Sherman Act, United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), and entered a decree. The government appealed on the relief granted and the defendants appealed on the finding of liability and the fairness of the trial.

3. On June 13, 1966, the Supreme Court, in a six-to-three decision, affirmed the District Court in part, reversed in part, and remanded for further hearings on relief. 384 U.S. 563. The remand directed that the District Court consider divestiture of the assets of defendant ADT, which had been found to have 73% of the accredited central station business nationwide, on a city-by-city basis (at pp. 577-578). Justice Douglas, writing for the majority, conceded that a localized market analysis could show that some cities, where the defendants faced no "competition", might not support more than one accredited central station. Justice Fortas, joined by Justice Stewart, dissented on the grounds that the monopolization finding, the basis of the government's case, rested upon illogical and unrealistic definitions of both the relevant service and geographic markets delineated by the lower court. The remand directed consideration of localized

relief in each of the cities in which defendants operated. In at least 20 of the cities in which the defendants had no competition from other "accredited central stations", the relevant service market, they were found to have been losing money because of "fringe competition". Justice Harlan also dissented on the issue of the relevant service market definition and likewise noted that while a national market might be found for §2 injunctive purposes, "... immediate competition takes place only within individual communities...." (at pp. 583-584).

4. After over a year of extensive further documentation, depositions, negotiations and hearings, Judge Wyzanski entered a final decree on July 11, 1967. Aside from generalized injunctive relief, including a prohibition against predatory pricing "at unreasonably low charges" (§V[B]), the final decree directed varying amounts of divestiture of the assets by ADT, but only in 21 of the 115 cities ADT served, and directed other relief relating to the offering of contracts by ADT to competitors in only five cities.

5. Two treble damage actions were brought in the United States District Court for the Eastern District of Pennsylvania by competitors of the defendants, Robinson Electric Protective Corp. v. Grinnell Corp., et al., Civ. No. 27961, and Sentinel Alarm Corporation v. Grinnell Corporation, Civ. No. 36061. The theory of these cases was that the defendants, beginning in 1958, had attempted to drive these competitor-plaintiffs out of business by predatory pricing. These cases primarily involved defendants' activities in the greater Philadelphia area, the market area for a number of the class representative subscriber plaintiffs in the instant cases. After extensive discovery covering pricing practices, the defendants settled the cases prior to trial.

6. A series of similar suits was instituted in various jurisdictions by both competitors and subscribers of the alarm company defendants. Suits were filed by over 48 competitors of the defendants relating to the alleged predatory pricing practices in over 30 cities throughout the United States. In addition to the national class actions filed by Petitioner, over 54 other subscriber actions were filed by other counsel. While many of these subscriber actions were filed before those filed by Petitioner, none of the firms involved attempted to represent a subscribers' class of any size. No other subscribers' suit was ever filed as a class action except for three later statewide governmental class actions, which were filed three months after the national class actions. The total amount of commerce involved in the subscribers' actions other than those brought by Petitioner is approximately 6 1/4% of the total amount of business done by defendants during the period covered in the settlement of the class actions.

7. In July, 1968, Petitioner filed three national class actions in the United States District Court for the Eastern District of Pennsylvania for all governmental, commercial and industrial subscribers of the defendants. The breadth of the classes, which has been maintained in the settlement, is such that the only subscribers not covered are residential subscribers, governmental agencies above the State level, embassies and governmental entities in three states who are represented in separate statewide class actions (New Jersey, Maryland and Connecticut), (N.D. Ill 68 C-1662, 68 C-1663, and 68 C-1667).

8. On October 3, 1968, the national class actions, along with all but one of the other pending competitor and subscriber cases, were transferred pursuant to 28 U.S.C. §1407 to the United States District Court for the Southern District of New York

for consolidation and coordination for pre-trial purposes. After extensive discovery was undertaken by the competitor plaintiffs to develop the predatory pricing theory, the defendants -- prior to any settlement with any subscriber plaintiff -- settled all but one of the competitor cases for over $12 million. One group of 36 of these competitor plaintiffs settled for $6.3 million, although some of those "competitors" had never engaged in accredited central station operations - the service market which defendants were held to have monopolized in the government suit.

9. Upon consolidation of the cases, a steering committee of plaintiffs' counsel was established in an attempt to coordinate all competitor and subscriber plaintiffs' discovery. Petitioner served on the committee and drafted the original Motion For Production of Documents. Petitioner, as a committee member, likewise engaged in review and finalization by the committee of the joint set of plaintiffs' interrogatories. Eventually competitor and subscriber plaintiffs stopped coordinated discovery because the interests of the two groups relating to the proof of type of violation (price-fixing v. predatory pricing) and damages rested upon diametrically opposed theories.

10. Petitioner alone prepared the substantive cases for the three national classes, undertaking a review and analysis of the Government record, as well as an inspection of the contents of the document depository established by the defendants. Petitioner prepared and circulated to counsel in other individual subscriber cases a preliminary memorandum relating to damages. Petitoner received no memoranda from other counsel relating to the substantive case.

11. The defendants moved for partial summary judgment alleging that the applicable statute of limitations was tolled only through July 13, 1967. Petitioner was one of the five firms

participating in the steering committee established to coordinate the response of all competitor and subscriber plaintiffs to the summary judgment motion. Petitioner prepared the initial draft of the plaintiffs' joint brief submitted to the District Court. This draft contained an extensive argument for the independent application of §5(a) and §5(b) of the Clayton Act. Other members of the steering committee, over petitioner's objection, removed this argument from the final joint brief.* The District Court, on consideration of briefs and affidavits and without oral argument, denied defendants' motion and held that the statute of limitations was tolled until September 9, 1968. Russ Togs, Inc. v. Grinnell Corp., 304 F. Supp. 279 (S.D.N.Y. 1969). This opinion relied upon the theory of independent application of §§5(a) and 5(b).

12. The summary judgment decision was appealed to the Court of Appeals. Petitioner participated in the preparation of the brief filed for all plaintiffs. Upon Petitioner's vigorous insistence, the argument relating to the independent application of §§5(a) and 5(b) was inserted in the plaintiffs' joint brief. Petitioner and counsel for a competitor plaintiff both argued before the Court of Appeals. The Court of Appeals affirmed the District Court's decision, relying primarily upon the independent application theory. 426 F.2d 850 (2d Cir. 1970). As a result of the ruling on defendants' partial summary judgment motion, the three national class actions were held to have been timely filed. However, the rulings clearly established that with respect to any unfiled cases, the statute of limitations expired in September, 1968.

13. Defendants filed a Petition for a Writ of Certiorari in the Supreme Court of the United States. Peti-

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* Due to Petitooner's vigorous objection, token reference was made to this argument in plaintiffs' joint brief.

tioner participated in drafting the papers in opposition. The Supreme Court denied certiorari. 400 U.S. 878 (1970).

14. At an early stage in the proceedings a motion was made to dismiss the action against defendant Automatic Fire Alarm Company of Delaware because it was not in existence at the time the suit was filed, having been acquired by Automatic Fire Alarm Company. Petitioner filed a Motion to Amend for the class plaintiffs under F.R.C.P. Rule 15(c), requesting the Court to substitute the latter company as a defendant relating back to the original filing date of complaints. Plaintiffs in the other actions filed similar motions in those actions and the motions were granted in all cases.

15. Petitioner alone moved in 1969 to have the instant actions certified as class actions. This motion was stayed by order of the District Court pending the outcome of the summary judgment issue.

16. The class action issue was fully briefed by Petitioner (original and reply briefs), and a supporting affidavit was filed by Petitioner. No other party or counsel researched, prepared or filed papers in support of class action certification. Oral argument was presented to the District Court on the issue of class certification on June 18, 1971. Petitioner alone presented the case for class certification. No other counsel appeared to represent any of the classes or any member of the classes.

17. Petitioner alone initiated settlement negotiations with the defendants in the class actions beginning on February 16, 1970. No progress was made until immediately following the oral argument on class certification. Thereafter, over a period of two months, Petitioner alone negotiated the $10 million settlement for the three national classes as defined in the class

complaints, covering all purchases over an 11 1/4 year period. Petitioner alone negotiated the details of the settlement agreement for the three classes. No other plaintiff's counsel was present at any of the negotiating sessions. Petitioner alone presented the settlement to the District Court in the fall of 1971. At the time this settlement agreement was executed, on August 27, 1971, the national class actions had been pending for more than three years. Discovery by interrogatories and requests for production of documents had been substantially completed. All preliminary motions were filed, briefed, argued and resolved by judicial decision.

18. Legal notice (approved by the District Court) of the class action, of the proposed settlement and of Petitioner's request for counsel fees was mailed on December 23, 1971 to each of the then current 89,816 subscribers of defendants ADT, Holmes and AFA. Legal notice was also published in each regional edition of The New York Times and The Wall Street Journal once a week for three weeks. The defendants paid all notice costs* as they had agreed to do in the settlement agreement. Petitioner responded to the numerous written and oral communications resulting from such notice.

19. As provided by Settlement Order No. 1, a class action committee consisting of Petitioner and attorneys for the defendants was established to oversee management and administration of the Notice program. In fact, Petitioner assumed full responsibility for administration of the three class actions. All mail in response to the Notice, including claims and requests for exclusion, were forwarded to Petitioner's offices for processing.

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* These costs were approximately $37,895.

20. All claims and exclusion requests were initially reviewed by Petitioner and challenge letters were sent to all challenged claimants. Over 14,000 claims were processed and over 3,200 challenge letters sent. A number of plaintiffs who filed independent actions chose to file claims against the settlement fund.

21. Petitioner alone, for the classes, prepared and filed papers in response to motions filed by one law firm representing a small number of non-litigating claimants to delay the hearing on approval of the settlement, to extend the date for exclusion, and to undertake voluminous discovery. Petitioner alone, for the three classes, orally argued against such motions.

22. Petitioner alone represented the national classes in procedures adopted by the District Court for handling all requests for review of the settlement fund and interest throughout the pay-out period, and Petitioner will alone continue to represent the national classes on all administrative matters to be undertaken in the future.

23. Hearings on approval of the settlement took place on May 24, 1972 and May 25, 1972. A small number of objectors filed memoranda and affidavits in opposition to the proposed settlement. Petitioner alone, among all plaintiffs' counsel, prepared and filed papers in support of the settlement and alone, among all plaintiffs' counsel, orally argued for approval of the settlement. The defendants and a number of objectors also appeared and were heard at these hearings.

24. The vast preponderance of class members of the national classes approved the settlement negotiated by Petitioner and approved by the District Court. Only a small number of claims (representing 1/2 of 1% of billings of more than 14,000

claimants) objected to the proposed settlement in the District Court.

25. On December 27, 1972, the District Court filed its decision approving the settlement and awarding $1.5 million in attorneys' fees, plus disbursements, to Class Counsel. City of Detroit v. Grinnell Corp., 356 F. Supp. 1380 (S.D.N.Y. 1972).

26. A Final Judgment was entered on January 23, 1973 approving the settlement and incorporating the settlement agreement under which Petitioner was to continue to administer the settlement and represent the classes for challenge purposes. A small group of claimants, represented by one firm, filed a Notice of Appeal from the determination that the settlement was reasonable. However, because of the terms of the settlement, the principal sum of $10,000,000 began earning interest as of January 23, 1973 at the rate of one point above the prime rate as it existed from time to time at the Chase Manhattan Bank, New York, N.Y.

27. A Final Judgment on the attorneys' fees was entered January 26, 1973. It awarded $1.5 million, plus disbursements to April 20, 1972 of $14,918, to Petitioner and retained jurisdiction for purposes of determining whether four other petitioning firms were entitled to share in this fee.

28. One law firm representing a number of claimants filed a Notice of Appeal from the Judgment of January 26, 1973. The same firm did not appeal the Judgment of January 23, 1973.

29. Petitioner alone represented the national classes on the appeal from the Final Judgment of January 23, 1973 approving the settlement. Petitioner alone filed briefs and orally argued for the national classes on the appeal from this Judgment in the United States Court of Appeals for the Second Circuit.

30. On March 13, 1974 the United States Court of Appeals for the Second Circuit affirmed the Judgment of January 23, 1973 approving the settlement and reversed and remanded for further hearings the Judgment of January 26, 1973 awarding counsel fees to Petitioner. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). In affirming the District Court's approval of the Settlement, the Court of Appeals found that the Settlement "...was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced." 495 F.2d at 458.

31. Pursuant to Settlement Order No. 3, dated September 30, 1974, the Class Action Committee, designated pursuant to Settlement Order No. 1, was terminated and Petitioner alone was given full responsibility for all further class action administration, including control over investment and disbursement of settlement funds and resolution of all outstanding challenges to claims. Since September 30, 1974 Petitioner has undertaken all responsibility for all class action administration.

32. Pursuant to Settlement Order No. 3, a hearing was held on November 25, 1974 on all outstanding challenges to claims. Petitioner alone represented the class at such hearing. As a result of Petitioner's briefs and oral argument, one claim with transactions in excess of $9 million was disallowed, thus increasing the individual recovery of each proper class member.

33. By Order of December 10, 1974, the District Court awarded David Berger, P.A., $41,122.69 to be paid out of the settlement fund for reimbursement of out-of-pocket expenses incurred through October 31, 1974, in the prosecution of these class actions and in obtaining approval of and in administering the settlement.

34. (a) As of October 23, 1975, defendants have paid over to Petitioner, in escrow pursuant to Settlement Order No. 3, the principal sum of $9,025,000. From January 23, 1973 (Date of Final Judgment) to the date of payment by defendants of each installment, that principal sum had earned interest at one point above prime in the amount of $1,678,434.63. Additional interest has been earned to date in the approximate amount of $363,400;

(b) As of October 23, 1975, $975,000 of the Settlement Fund principal remains unpaid by defendants Holmes and AFA. It is estimated that under the terms of the Settlement Agreement, the interest earned on this unpaid portion of the Settlement Fund as of October 23, 1975, will equal or exceed $223,650;

(c) Accordingly, as a result of the provisions of the Settlement Agreement, the total interest earned on the $10,000,000 principal Settlement Fund will equal or exceed $2,200,000, causing the gross Settlement Fund ultimately to exceed $12,000,000;

(d) On March 31, 1975, 13,712 checks were distributed to claimants in the amount of $9,357,777.14. This represented the first of two distributions to the claimants. No deductions for attorneys' fees were made from this first distribution.

35. An attorney for one of the defendants herein made the following statement at the first fee hearing in opposition to Petitioner's request for $2.5 million fee:

"However, I say, in any event, that the primary reason in my mind for the settlement is Mr. David Berger and the reputation he bears from my personal experience in opposition to him in the electrical cases in Philadelphia a good many years ago.

"And I am also impressed by the fact that he said to your Honor just the other day that the defendants had in effect left $3 million on the table. It is regrettable for me for I wish we had settled for $7 million instead of $10 million.

"So with all those things taken into account, I still think the application is excessive.

"My client feels that way very strongly.

"However, on the other hand, I cannot undo the fact that Mr. Berger and this firm are very, very able and experienced in this field."

36. Petitioner was responsible for accomplishing and administering the settlement herein.

37. Petitioner has spent at least 3577.75 attorneys' hours, 5918.60 paraprofessionals' hours and 1653 hours by certified public accountants on this litigation through October 9, 1975. A breakdown of that time by individual attorneys and by categories of activity is annexed hereto as Exhibit A. It is estimated that in the future an additional 400 hours* will be expended by attorneys of Petitioner and an additional 750 paralegal hours will be expended.

38. David Berger, P.A., Attorneys at Law, is a professional association or corporation. It was formed in September, 1970 by certain attorneys in the Cohen firm. Since its inception, its executive committee, who are the equivalent of members of the firm in a partnership, have been Mr. Berger,

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* This includes proceedings concerning an award of attorneys' fees. Exclusive of fee matters, it is estimated an additional 300 attorneys' hours will be expended on settlement administration.

EXHIBIT A
Time Expended by David Berger, P.A.
Through October 9, 1975

1. Total time of attorneys as a group, by category of activity:

		Hours
(a)	Pleadings and motions	32.8
(b)	Discovery	173.00
(c)	Court appearances and preparation	282.75
(d)	Settlement negotiations	244.50
(e)	Settlement procedures	400.25
(f)	Settlement administration	1349.60
(g)	Fee application	194.25
(h)	Briefs and legal research	502.50
(i)	Appellate proceedings after Final Judgment	236.75
(j)	General	154.85
(k)	Fee agreements and interventions	10.00
	TOTAL:	3577.75

2. Total time of paraprofessionals as a group by category of activity:

(a)	Settlement administration	5168.60
(b)	Discovery	750.00
	TOTAL:	5918.60

3. Total time spent by each attorney as to each category of activity:

(a) Pleadings and motions

H. L. Montague	6.8
Herbert B. Newberg	16
H.L. Schambelan	10
TOTAL:	32.8

(b) Discovery

David Berger	12
H.L. Montague	67.9
Herbert B. Newberg	46.5
A.L. Lerner	23.5
H. L. Schambelan	23.1
TOTAL:	173

(c) Court appearances and preparation

David Berger	113
H.L. Montague	128.25
Herbert B. Newberg	11.5
Warren D. Mulloy	10.00
TOTAL:	282.75

(d) Settlement negotiations

David Berger	51.5
H.L. Montague	39
Herbert B. Newberg	154.0
TOTAL:	244.50

(e) Settlement procedures

David Berger	63.5
H.L. Montague	165.25
Herbert B. Newberg	166
Warren D. Mulloy	2.0
TOTAL:	396.75

(f) Settlement Administration

David Berger	69.25
H.L. Montague	558.25
Herbert B. Newberg	56.0
Harold Berger	76.75
Prof. Alexander Frey	113.00
Warren D. Mulloy	1.0
H. L. Schambelan	11.35
J.R. Lally	44.0
J.C. Meredith	33.25
L. Barrack	4.0
E.D. Greenburg	306.75
G.J. Rodos	34.0
P.C. Cohen	32.0
B. Shaw	10.0
TOTAL:	1349.60

EXHIBIT A
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(g) Fee Applications

David Berger	27.5
H.L. Montague	152.75
J.C. Meredith	14.00
TOTAL:	194.25

(h) Briefs and legal research

David Berger	46
H.L. Montague	268
Herbert B. Newberg	177.5
G.J. Rodos	6.5
M.G. Davidoff	3.0
B.K. Cohen	1.5
TOTAL:	502.5

(i) Appellate proceedings after final judgment

David Berger	102.5
H.L. Montague	134.25
TOTAL:	236.75

(j) General

David Berger	29.05
H.L. Montague	65.05
Herbert B. Newberg	60.00
Warren D. Mulloy	.75
TOTAL:	154.85

(k) Fee agreements & interventions

Herbert B. Newberg	10.0
TOTAL:	10.0

TOTAL (a) through (k) 3577.75

EXHIBIT A
Page Three

Mr. Montague and Mr. Newberg until he left the firm in 1972. Former Judge Harold Berger has been a member of the Executive Committee since he joined Petitioner's firm in 1972. Warren D. Mulloy and Leonard Barrack are also members of the Executive Committee.

39. David Berger was a senior partner at the firm of Cohen, Shapiro, Berger, Polisher and Cohen, until he left in 1970. Thereafter, he formed the Professional Association of David Berger, P.A.

Mr. David Berger is an honors graduate of the University of Pennsylvania (B.A. 1932) and its Law School (LL.B. 1936), where he was ranked second in his class, was a member of the Order of the Coif, and editor of the University of Pennsylvania Law Review. Upon graduation, he became assistant to Professor Francis H. Bohlen and was admitted to practice in Pennsylvania in 1938. He was Chancellor of the Philadelphia Bar Association in 1963. He has served as a member of the Advisory Committee of the Antitrust and Trade Regulation Report (BNA) since 1964, and has served as a member of the United States Supreme Court Advisory Committee on the Federal Rules of Evidence since 1965. He was City Solicitor of the City of Philadelphia from 1956 until 1963. He is currently Dean of the International Academy of Trial Lawyers.

40. Herbert B. Newberg was a partner at Cohen, Shapiro, Berger, Polisher and Cohen until he left to join David Berger, P.A., in 1970. There, he was a member of the Executive Committee. Mr. Newberg left David Berger, P.A. in 1972 and is now the senior member of his own firm. He is currently writing a trial manual on class actions for publication.

Mr. Newberg was graduated first in his class at the University of Pennsylvania Wharton School (B.S. 1958). He received his law degree from Harvard Law School (J.D. 1961). He was admitted to the Supreme Court of Pennsylvania in 1962. Mr. Newberg was an Assistant City Solicitor of the City of Philadelphia until 1964 when he joined Mr. Berger in the practice of law. Mr. Newberg has published several articles relating to class action litigation.

41. H. Laddie Montague, Jr. was associated with Cohen, Shapiro, Berger, Polisher and Cohen and refused a partnership offer there to join David Berger, E.A. in 1970 as a member of the Executive Committee.

Mr. Montague was graduated from the University of Pennsylvania (B.A. 1960) and the Dickinson School of Law (LL.B. 1963) where he was a member of the Board of Editors of the Law Review. He was admitted to the Supreme Court of Pennsylvania in 1964 and to the courts of the District of Columbia in 1965. Mr. Montague has often lectured on class action and antitrust litigation to the Pennsylvania Bar Institute.

42. The standing of Petitioner in successfully conducting major class action and antitrust litigation is among the highest in the country, as has been recognized by numerous Courts that have observed Petitioner's work.

43. In the brass mill litigation, Judge Fullam found concerning Petitioner and its co-lead counsel in awarding their fee that "[T]he abilities and standing of petitioning counsel are very high." Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557, 559 (E.D.Pa. 1969).

44. In Professional Adjusting Systems of America, Inc. v. General Adjusting Bureau, 352 F.Supp. 648, 651 (E.D.

Pa. 1972), Judge Newcomer referred to Mr. Berger as "one of the most able antitrust lawyers in the country...".

45. After a full evidentiary hearing on remand in Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 1974-2 Trade Cases ¶75,361 (E.D. Pa. 1974), Judge Harvey found that Mr. Berger was a "highly skilled and experienced" attorney and that the members of his firm "were likewise highly competent practitioners" (at pp. 98,164-98,165). Judge Harvey also found that Mr. Berger had "...an unequalled national reputation as a plaintiffs' class action attorney" (at p. 98,157), that his experience in national class action litigation could "...hardly be equalled by any attorney in the country," (at p. 98,165) and that he "...was not only capable of successfully conducting a national class action litigation, but was also possessed of a visible track record which demonstrated his successes in this field." (At p. 98,157).

46. Petitioner is one of the most experienced plaintiffs' antitrust counsel in the country. Major antitrust cases which Petitioner has completed or which are now pending include, inter alia, the following:

City of Philadelphia v. Morton Salt Company, 248 F.Supp. 560 (E.D.Pa. 1965);

Philadelphia Electric Company v. Anaconda American Brass Company, 43 F.R.D. 452 (E.D.Pa. 1968);

Illinois v. Harper & Row Publishers, Inc., 301 F.Supp. 484 (N.D. Ill. 1969);

City of Philadelphia v. Sterling Faucet Company, (E.D.Pa. C.A. No. 43923);

Regal-Tyson, Inc. v. Globe Ticket Company,
(E.D.Pa. C.A. No. 43221);
City of Philadelphia v. General Host Corporation,
(E.D.Pa. C.A. No. 68-704);
City of Philadelphia v. United States Steel Corporation,
(E.D.Pa. C.A. No. 39517);
City of Philadelphia v. Interpace Corporation,
(E.D.Pa. C.A. No. 43008);
Kirihara v. Bendix Corp.,
1969 CCH Trade Cases ¶72,941 (D.Haw. 1969);
County of Lackawanna, Pennsylvania v. Automobile Manufacturers Association,
(C.D.Cal., M.D.L. Docket No. 13) (re motor vehicle air pollution control devices;
City of Philadelphia v. Emhart Corporation,
50 F.R.D. 232 (E.D.Pa. 1970) (re master lock and key systems);
City of Philadelphia v. Chas. Pfizer and Sons, Inc.,
(E.D.Pa. C.A. No. 68-144) (re antibiotics);
Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation,
(E.D.Pa. C.A. No. 41773) (re plumbing fixtures);
City of Detroit v. American Bakeries Company,
(E.D.Mich. C.A. No. 33046) (re bakery products);
City of Philadelphia v. American Oil Company,
(53 F.R.D. 45 (D.N.J. 1971) (wholesale and retail gasoline);

City of Philadelphia v. General Motors Corporation,
(E.D.Pa. C.A. No. 70-2753) (re Governmental auto fleet discounts);
State of Michigan v. American Cast Iron Pipe Company, et al.,
(N.D. Ala. 71-1122-S) (re cast iron pipes);
State of Connecticut v. National Broiler Marketing Association,
C74-1257A (N.D. Ga.);
Professional Adjusting Systems of American, Inc. v. General Adjustment Bureau, Inc.,
72 Civ. 5122 (S.D.N.Y.);
Dorsey Corporation, et al. v. E.I. du Pont Nemours & Co., et al.
74 Civ. 3826 (S.D.N.Y.)

NON-CLASS ACTION ANTITRUST CASES

Penn Galvanizing Co. v. Lukens Steel Co.,
Civ. No. 71-820 (E.D.Pa.);
Samuel J. Lefrak. et al. v. Arabian American Oil Co., et al.,
Civ. No. 74-C-1700 (E.D.N.Y.);
Allen Organ Co. v. International Rockwell, Inc.,
363 F.Supp. 1117 (E.D.Pa. 1973);
Belmont Industries v. Bethlehem Steel Corp.,
Civ. No. 70-3488 (E.D.Pa.);
Data Research Corporation, et al. v. International Business Machines Corporation,
71 Civ. 1451 (S.D.N.Y.).

47. In City of Philadelphia v. Morton Salt Company, supra, Petitioner (Messrs. Berger, Montague, Newberg) acted as lead counsel in establishing a national Governmental class under Rule 23 prior to its amendment against producers of rock salt. The copper pipe and brass mill tube cases were the first price-fixing treble damage actions under amended Rule 23 in which a national class was upheld. 43 F.R.D. 452 (E.D.Pa. 1968). In Illinois v. Harper & Row Publishers, Inc., supra, Petitioner (Berger and Newberg) successfully represented a class on behalf of governmental bodies and school districts throughout the United States. In City of Philadelphia v. Interpace Corporation, 438 F.2d 401 (3d Cir. 1971), Petitioner (Berger and Montague) successfully represented eight statewide Governmental classes. Petitioner (Berger and Montague) is lead counsel in a pending nationwide class action on behalf of all independent property insurance adjusters, PASA v. General Adjustment Bureau, Inc., 64 F.R.D. 35 (S.D.N.Y. 1974).

48. Messrs. Newberg and Montague have been associated with Mr. Berger since 1964 and their primary experience since that time has been in the area of private antitrust litigation. Messrs. Berger, Newberg and Montague together prosecuted the Rock Salt case, City of Philadelphia v. Morton Salt Co., et al., Civ. No. 33781 (E.D.Pa.) commenced in July 1963, fully pretried and settled only after all discovery was completed. Messrs. Berger, Newberg and Montague were responsible for the national deposition program taken in the rock salt cases.

Messrs. Berger, Newberg and Montague were also counsel for plaintiffs in the steel wheel cases, City of Philadelphia v. United States Steel Corporation, et al., Civ. No. 39517 (E.D.Pa.

wherein Mr. Newberg took all the depositions on behalf of plaintiffs. The steel wheel case was settled during the deposition program.

Messrs. Berger and Montague conducted the "East of the Rockies" Concrete Pipe Antitrust Litigation, which resulted in a $5,000,000 settlement on behalf of eight statewide governmental classes.

49. Mr. Berger is lead counsel for plaintiffs in the Penn Central Securities Litigation, (M.D.L. Docket No. 56). In 1973, Mr. Berger concluded a trial before Judge John P. Fullam in the Penn Central Railroad Reorganization Proceedings, Bankruptcy No. 70-341, (E.D.Pa.) seeking to declare invalid a $300 million pledge by Penn Central Transportation Co. to 53 banks of all the shares of the Pennsylvania Company, on the grounds, inter alia, that Section 10 of the Clayton Act had been violated. Decision in that case is pending.

As co-lead counsel in the Ampex Securities Litigation, Mr. Berger successfully argued the class certification issues before the Ninth Circuit Court of Appeals. Blackie v. Barrack, ___F 2d___, CCH Fed. Securities Law Rep. ¶95,312 (9th Cir. 1975).

He has argued in the United States Supreme Court and numerous Federal Courts of Appeals as well as state courts of last resort including the Pennsylvania Supreme Court.

50. Mr. Montague has tried a number of antitrust cases and has argued in numerous Federal Courts of Appeals.

51. Harold Berger is a member of the Executive Committee of Petitioner's firm. He is a graduate of University of Pennsylvania Law School (LL.B. 1951) and was admitted to practice in Pennsylvania in 1952. He is a former Judge of the

Court of Common Pleas of Philadelphia County (1971-72), is a past President of the Philadelphia Chapter of the Federal Bar Association (1968-1970) and is the author of numerous law review articles.

52. Professor Alexander H. Frey is of Counsel to Petitioner's firm and is a member of the Executive Committee. Professor Frey received his LL.B. degree from Yale University in 1921 and J.S.D. degree from the same University in 1925. He was admitted to practice in Connecticut in 1921, as well as New York in 1932 and Pennsylvania in 1934. He has been a Professor of Law at the University of Pennsylvania since 1932 to the present.

53. Warren D. Mulloy joined the Berger firm in December of 1972 as head of its Franchising Department. He was appointed shortly thereafter as a member of the firm's Executive Committee.

Mr. Mulloy was graduated from Dartmouth College (B.A. 1951) and the University of Pennsylvania Law School (J.D. 1954).. He was admitted to the Supreme Court of Pennsylvania in 1955 and has subsequently been admitted to various federal courts including the Supreme Court of the United States.

Prior to joining the Berger firm, Mr. Mulloy had been in the active practice of law, being first an associate with the law firm of White, Williams & Scott, in Philadelphia in its Litigation Section. Mr. Mulloy spent twelve years on the legal staff of the Penn Central Company and its predecessor, the Pennsylvania Railroad Company where he engaged in litigation throughout the United States, at times representing all of the railroads in the Eastern United States. Immediately prior to joining the Berger firm, Mr. Mulloy had served in the United

States Attorney's Office for the Eastern District of Pennsylvania, first as Chief of the Civil Division of that office and later, as First Assistant United States Attorney.

Leonard Barrack has been associated with Petitioner since 1971 and became a member of its Executive Committee in 1974. Mr. Barrack was graduated from the Law School of Temple University (J.D. 1968) where he was Editor-in-Chief of the Temple Law Review. He was admitted to the Pennsylvania Bar in 1969. Mr. Barrack served as a Law Clerk to the Delaware Court of Chancery in 1968-1969.

Joseph R. Lally joined the Berger firm in late 1970 and left it in the Fall of 1972 to become Assistant City Solicitor of Philadelphia in charge of antitrust. Mr. Lally was graduated from Saint Joseph College (B.S. 1961) and Villanova Law School (J.D. 1969). Mr. Lally was admitted to the Supreme Court of Pennsylvania in 1969. Prior to joining the Berger firm, Mr. Lally had been the Law Clerk for The Honorable Thomas J. Clary, Senior Judge, United States District Court for the Eastern District of Pennsylvania.

Bruce K. Cohen joined the Berger firm in 1972 upon graduation from law school. Mr. Cohen was graduated from Temple University (A.B. cum laude 1969) and the University of Pennsylvania Law School (J.D. 1972). He was admitted to the Supreme Court of Pennsylvania in 1972.

Howard L. Schambelan was associated with the Cohen, Shapiro, Berger, Polisher & Cohen law firm and joined the Berger firm in 1970. He was graduated from Haverford College (B.A. 1961) and Harvard University Law School (J.D. 1964). He was admitted to the Bar in 1965.

Joel C. Meredith joined the Berger firm in 1971. He received his preparatory education at the University of Illinois and Roosevelt University (B.S. 1966). He graduated from Villanova University Law School (J.D. 1969) where he was a member of the Board of Editors on the Law Review. Mr. Meredith was admitted to the Supreme Court of Pennsylvania in 1970.

Gerald J. Rodos joined the Berger firm in 1971. He was graduated from Boston University (B.A. 1967) and University of Michigan Law School (J.D. cum laude 1970). Mr. Rodos was admitted to the Supreme Court of Pennsylvania in 1971. Mr. Rodos is co-author of the Law Review Article, "Standing To Sue of Subsequent Purchasers for Antitrust Violations - The Pass-On Issue Reevaluated" in 20 S.D. L. Rev. 107.

Alan M. Lerner was an associate at Cohen, Shapiro, Berger, Polisher and Cohen and remained there after the formation of the Berger firm. Mr. Lerner is now a partner in the Cohen firm. He has not been involved in this litigation since 1970. Mr. Lerner was graduated from the University of Pennsylvania in 1962 (B.S. in Economics) and from the University of Pennsylvania Law School (LL.B. 1965). He was admitted to practice in New York in 1966 and in Pennsylvania in 1968. During 1967 and 1968 he served as a Law Clerk to The Honorable A. Leon Higginbotham, Jr., United States District Court for the Eastern District of Pennsylvania.

Merrill G. Davidoff has been associated with David Berger, P.A. since 1973. He was graduated from the Law School of the University of Pennsylvania (J.D. cum laude, 1973) and was admitted to practice in Pennsylvania in 1973.

Barry N. Shaw was admitted to practice in Pennsylvania in 1966. He was graduated from the Law School of Rutgers

University in 1965 (LL.B.). Mr. Shaw was associated with Petitioner for the period 1972 to 1973.

Earl D. Greenburg was graduated from the Law School of the University of Pennsylvania (J.D. magna cum laude, 1970) and admitted to practice in Pennsylvania in 1971. He was associated with Petitioner for the period 1971-1973.

Pauline C. Cohen was graduated from the Law School of Temple University (LL.B. 1965) where she was a member of the Board of Editors of the Temple Law Review. She was admitted to practice in 1966. She was associated part time with Petitioner in 1971 and 1972.

54. Paraprofessional services relating to these proceedings were provided primarily by Sharon L. Thomas, Peter G. Reynolds, Jr. and Emily Samson. Ms. Thomas received a B.S. Degree from Drexel University in 1971 and has been employed by Petitioner as a paraprofessional from December 1971, to date. Mr. Reynolds received a B.S. from Washington and Lee University in 1962 and has been Office Administrator for Petitioner since August, 1971. In this position he has worked on class administration and distribution in most major class actions handled by Petitioner. Ms. Samson received a B.A. Degree (cum laude) from the University of Pittsburgh (1971) and is a graduate of the Institute for Paralegal Training (1971). She commenced working as a paralegal at Petitioner's firm in January 1972 and continued in that capacity until early 1973 when, because of marriage, she moved to another city.

55. In litigation of this kind, Petitioner does not have a "normal billing rate" in the sense of an hourly rate applied to each individual attorney for the hours worked.

Normally it is compensated on a contingent basis by a percentage of the recovery. Even where its representation is not completely contingent, a factor is normally included in its compensation predicated on the amount recovered. For example, in Allen Organ Co. v. North American Rockwell Corporation, 363 F.Supp. 1117 (E.D. Pa. 1973), Petitioner represents the plaintiffs under a fee agreement which provides for the monthly payment of fees at the rate of $75 per hour for all personnel, including para-professionals, plus a contingent fee of 25%. One-half of the fees received under the hourly rates are to be credited against the contingent fee. In other instances, Petitioner has entered into similar fee agreements.

In other instances, Petitioner has entered into fee agreements for payment of initial $10,000 retainers plus a success fee based on the results achieved.

56. The hourly rates set forth in Exhibit "B" hereto are the minimum rates which Petitioner could charge for the attorneys listed therein if retained on an hourly basis in an antitrust matter, together with a success fee based upon the result. The rates set forth in Exhibit "B" are reasonable minimum hourly rates for the attorneys listed therein, for the period involved in this litigation, for work on routine antitrust matters, regularly and currently billed without reference to contingency, success, the quality of work or other facts which may properly be taken into account. The charge of substantial additional fees, in addition to such minimum hourly rates, based upon a successful result is common practice among major antitrust firms even where no contingency to the firm is involved.

57. During the year 1974, based upon an average paralegal salary of $11,000 per year, the cost to Petitioner to employ a paralegal was in excess of $9.00 an hour. The prevailing rate charged to clients for paraprofessionals' services undertaken on a non-contingent basis is $25 per hour.

58. Petitioner generally accepts representation in class action litigation on a contingency fee basis. Accordingly, in order to recover a fee, plaintiff must be successful in the prosecution of the suit, obtaining a benefit for his clients and the class. A large portion of Petitioner's practice is comprised of class action and contingent fee litigation.

59. All class action or antitrust suits are not successful. In contingent fee cases where the class action suit is not successful, petitioner does not receive any compensation whatsoever for the hours expended in rendering legal services.

60. Petitioner has commenced and prosecuted some class action complaints which were not settled and which were dismissed after substantial pretrial, but before trial. For example, in the cases captioned In re Motor Vehicle Pollution Control Devices, M.D.L. Docket No. 31 (C.D. Cal.), petitioner expended approximately 2000 hours prosecuting a nationwide class action, including the class action issues, extensive review of documents, conducting extensive depositions, presenting oral arguments in the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit, and in the preparation and filing of a Petition for Certiorari in the United States Supreme Court. On the eve of trial, the case was dismissed on the ground that the district court did not have the power to grant the equitable relief sought by plaintiffs.

Accordingly, the petitioner received no compensation for the hours of legal services rendered.

More recently, in In re Transit Company Tire Anti-trust Litigation, M.D.L. Docket No. 111 (W.D. Mo.), plaintiff expended approximately 2000 attorney hours in discovery and in the briefing, trial and argument of the nationwide class action issue. The court ultimately denied the class action. Accordingly, petitioner may not be compensated for those hours expended.

The Air Pollution case followed a Government Civil Action, U.S. v. Automobile Manufacturers Association, Civ. No. 69-75-JWC (C.D. Cal.) which ended in a consent decree. 307 F.Supp. 617 (C.D. Cal. 1969). The Transit Company Tire case followed a Federal Trade Commission Complaint In the matter of Goodyear Tire and Rubber Co., et al. Docket Nos. 671-007-0011 which also ended with the entry of a consent decree.

61. The risks involved in the prosecution of class action cases normally are substantial, both as to the merits of the case and as to the certification of the class or classes. The commencement of a class action antitrust suit does not insure success to plaintiff's counsel, even where a prior Government suit was filed.

62. All of Petitioner's contracts with its clients in these actions were fully contingent in nature and completely dependent upon a successful recovery. Petitioner, to date, has not received any fees or reimbursement for services from any client or from the Settlement Fund for any services rendered throughout the more than seven years during which Petitioner has

been active in these actions. */

63. Petitioner has fee contracts with 21 approved claimants to the settlement fund with total valid transactions in the amount of $1,101,371.80. The total recovery paid or still due Petitioner's individual clients from the settlement fund approximates $44,054.87.

64. Petitioner's fee contracts with its clients provide for payment of contingent fees in the amount of 25% of the recovery, except in one instance, of 40%. In order that litigation expenses be equitably shared by all class members, Petitioner has agreed to charge each of its clients who contracted to pay a fee only that percentage of their approved claim which corresponds to the equivalent amount that the Court may award from the approved claims of other class members as counsel fees.

65. The risk of litigation in successfully prosecuting these national class actions was very high. There was a considerable risk that if the national class actions had been fully litigated through trial that the plaintiffs would not have recovered at all. Several substantial roadblocks stood in the way of ultimate victory on the merits for the plaintiffs in these national class actions.

66. The national class actions involved complex and novel questions of law and fact, including the issues of service and geographic market definition, the liability of

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*/ Petitioner, throughout this litigation, did not receive any reimbursement from its clients for out-of-pocket expenses advanced by it. Petitioner received reimbursement for out-of-pocket expenses for the first time, in December , 1974, pursuant to a Court Order allowing payment of some accrued costs from the Settlement Fund.

defendants, proof of actual damages suffered by members of the subscriber classes, and certification of national classes.

67. Defendants American District Telegraph Company (ADT), Grinnell Corporation (Grinnell), Holmes Electric Protective Company (Holmes) and Automatic Fire Alarm Company (AFA) were in the business of providing "central station protection services" against the hazards of loss by burglary or fire. Alarm systems were installed on the premises of their customers, and protection services are furnished under subscriber contracts. "Central stations" were maintained in various cities throughout the country where the alarm devices on the protected premises were monitored.

68. In the national class actions, the liability of the defendants was not prima facie established by the prior government action.

69. The government's victory in the prior suits against these defendants was in large part predicated on defendants' predatory price-cutting practices which demonstrated the existence of both monopoly power and an intent to destroy competition. These findings were of dubious value to the class plaintiffs in these actions. No questions with respect to any injury to subscribers were either put in issue or determined in the government action. In fact the basis for the government decree was adverse to the interests of the subscriber-plaintiffs.

70. The government decree only covered the period from 1957 until 1961 and was of no value for the additional seven and a quarter year period covered by the class complaints herein in establishing liability.

71. The government's case was based on predatory pricing in competitive cities and conduct in monopoly cities designed to deter entry. In this event, the only persons probably injured by defendants' conduct were the competitors who were driven out of business or deterred from expanding their operations. In a predatory pricing situation customers are normally benefited, not injured, by the lower prices involved. The defendants paid $12 million to settle the competitor suits (which were not class actions) before settling a single subscriber action. David Shapiro, counsel for a group of competitors who had previously settled their suits against defendants for $6,000,000, filed an affidavit in the settlement hearing herein on the reasonableness of the settlement for the national subscriber classes stating that based upon his analysis of the record in the Grinnell proceedings the subscribers suffered no damages at all.

72. In the instant cases, the proper definition of the market both in terms of the service involved and the relevant geographic market would vary from city to city. Defendants' relevant activities varied from city to city. Costs and prices varied from city to city to such an extent that the evidence in the government case showed that ADT deviated from its minimum base rates 99% of the time and that even in 20 cities where defendants had a "monopoly" they were losing money. Certification of national subscriber classes was highly risky because, among other reasons, individual issues might outweigh any common issues.

73. The majority of claimants in the national class actions, approximately 8800 of 14,000, were subscribers in competitive cities where prices were low and alternative services were open to subscribers.

74. For the nearly 60% of claimants who were in cities where predatory pricing had taken place, as well as for claimants who were in monopoly cities where defendants were losing money, the possibility of proving damages was minimal.

75. There was a serious question as to whether these actions could have been maintained as class actions at all. The separate liability and damage issues presented enormous difficulties. There were different competitive climates in each of the locales involved. All members of each class did not contract for the same services even in the same city.

76. The settlement obtained for the national classes herein was fully one hundred percent of the potential single damages for the same plaintiffs if the case had been fully litigated and tried.

77. The quality of Petitioner's work throughout the proceedings in accomplishing and administering the settlement was very high. Petitioner exhibited an unusually high degree of skill in conducting this litigation. Because the work of Petitioner has been efficient and of an atypical quality, the total amount of hours expended on the litigation is relatively low compared to the result accomplished. Less experienced and less skillful attorneys would have expended substantially more time in achieving the same result than did Petitioner.

78. Economy in time was also realized by reason of Petitioner alone representing all three national classes rather than separate attorneys representing each class respectively. Thus, duplication in time expended was totally avoided.

79. Costs were also kept to a minimum in the class actions sub judice. Through the first distribution to over 13,000 claimants, total costs, including computer costs, have amounted to approximately $65,250.00.

80. All class member-claimants have benefitted substantially from Petitioner's foresight in negotiating a favorable interest provision in the settlement.

81. The defendants in these actions were represented by four outstanding law firms which were experienced in complex antitrust litigation generally and with these cases and which had shown willingness to litigate all issues in these cases thoroughly.

82. Some of the attorneys' time expended by Petitioner herein is based upon reconstruction of time for periods during which no contemporaneous records were kept by some attorneys. Such reconstruction was done in a meticulous and conservative manner, based upon careful review of Petitioner's files herein and the time records of other of Petitioner's attorneys. The figures included in Exhibit "A" hereto reflect accurate, if not conservative, statements of the actual time expended by Petitioner in these actions.

83. Virtually all of the attorneys' time of Petitioner in connection with these actions, including settlement administration time, was expended prior to final approval of the settlement herein by the Court of Appeals.

84. Based upon the above facts, the proper adjustment for risk and quality of work of the minimum hourly rate value of Petitioner's services in this litigation as to each

category of activity is as stated in Exhibit "C" attached hereto. The total reasonable value of the services of Petitioner's attorneys through October 9, 1975, based upon all factors relevant to a fee determination, is $1,248,614.50.

Dated: New York, New York
October 31, 1975

Yours, etc.,

LORD, DAY & LORD
Attorneys for Counsel
for Class Representatives
David Berger, P.A.
25 Broadway
New York, New York 10004

Minimum Hourly Rates For Attorneys In David Berger, P.A., For Routine Matters Regularly and Currently Billed Without Reference To Contingency, Success, The Quality of Work, Or Other Facts Which May Properly Be Taken Into Consideration

		Year Admitted
David Berger	125.00	(1938)
Herbert B. Newberg	100.00	(1962)
H. Laddie Montague	100.00	(1964)
Harold Berger	100.00	(1952)
Prof. Alexander Frey	100.00	(1921)
Warren D. Mulloy	100.00	(1955)
Leonard Barrack	75.00	(1969)
Joseph R. Lally	75.00	(1969)
Bruce K. Cohen	60.00	(1972)
Joel C. Meredith	70.00	(1970)
Gerald R. Rodos	60.00	(1971)
Alan M. Lerner	85.00	(1966)
Merrill G. Davidoff	50.00	(1973)
Barry N. Shaw	85.00	(1966)
Earl D. Greenburg	60.00	(1971)
Pauline C. Cohen	85.00	(1966)
Howard L. Schambelan	85.00	(1965)

EXHIBIT "B"

Exhibit E

Valuation of Time Expended By David Berger, P.A. Through October 9, 1975

1. Valuation of total time of attorneys as a group by category of activity:

Category	Hours	Minimum Value Based Upon Standard Hourly Rates	Multiple	Value Based On All Relevant Factors
a) Pleadings and motions	32.8	$ 3,130.00	4.0	$ 12,520.00
b) Discovery	173.00	16,901.00	4.0	67,604.00
c) Court appearances and preparation	282.75	31,600.00	4.0	126,400.00
d) Settlement negotiations	244.50	25,737.50	4.0	102,950.00
e) Settlement procedures	400.25	41,262.50	4.0	165,050.00
f) Settlement administration	1349.60	120,063.50	3.0	360,190.50
g) Fee Application	194.25	19,692.50	2.0	34,385.00
h) Briefs and legal research	502.50	50,930.00	4.0	203,720.00
i) Appellate proceedings after Final Judgment	236.75	26,237.50	4.0	104,950.00
j) General	154.85	16,211.25	4.0	64,845.00
k) Fee agreements and interventions	10.00	1,000.00	1.0	1,000.00
TOTAL:	3577.75	$352,765.75		$1,248,614.50

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2. Minimum value of total time spent by each attorney as to each category of activity based upon standard hourly rates:

Category	Hours	Minimum Value Based Upon Standard Hourly Rates
(a) Pleadings and motions		
H.L. Montague	6.8	$ 680
Herbert B. Newberg	16	1,600
H.L. Schambelan	10	850
TOTAL:	32.8	$3,130

Category		Hours	Minimum Value Based Upon Standard Hourly Rates
(b) Discovery			
David Berger		12	$ 1,500
H.L. Montague		67.9	6,790
Herbert B. Newberg		46.5	4,650
A.L. Lerner		23.5	1,997.50
H.L. Schambelan		23.1	1,963.50
	TOTAL:	173	$16,901.00
(c) Court appearances and preparation			
David Berger		133	$16,625
H.L. Montague		128.25	12,825
Herbert B. Newberg		11.5	1,150
Warren D. Mulloy		10.00	1,000
	TOTAL:	282.75	$31,600
(d) Settlement negotiations			
David Berger		51.5	$ 6,437.5
H.L. Montague		39	3,900
Herbert B. Newberg		154.0	15,400
	TOTAL:	244.50	$25,737.50
(e) Settlement procedures			
David Berger		63.5	$ 7,937.5
H.L. Montague		165.25	16,525
Herbert B. Newberg		166	16,600
Warren D. Mulloy		2.0	200
	TOTAL:	396.75	$41,262.50

Category	Hours	Minimum Value Based Upon Standard Hourly Rates
(f) Settlement administration		
David Berger	69.25	$ 8,656.25
H.L. Montague	558.25	55,825
Herbert B. Newberg	56.0	5,600
Harold Berger	76.75	7,675
Prof. Alexander Frey	113.00	11,300
Warren D. Mulloy	1.0	100
H.L. Schambelan	11.35	964.75
J.R. Lally	44.0	3,300
J.C. Meredith	33.25	2,327.50
L. Barrack	4.0	300
E.D. Greenburg	306.75	18,405
G.J. Rodos	34.0	2,040
P.C. Cohen	32.0	2,720
B. Shaw	10.0	850
TOTAL:	1349.60	$120,063.50
(g) Fee applications		
David Berger	27.5	$ 3,437.50
H.L. Montague	152.75	15,275
J.C. Meredith	14.00	980
TOTAL:	194.25	$ 19,692.50
(h) Briefs and legal research		
David Berger	46	$ 5,750
H.L. Montague	268	26,800
Herbert B. Newberg	177.5	17,750
G.J. Rodos	6.5	390
M.G. Davidoff	3.0	150
B.K. Cohen	1.5	90
TOTAL:	502.5	$ 50,968

Category		Hours	Minimum Value Based Upon Standard Hourly Rates
(i) Appellate proceedings after final judgment			
David Berger		102.5	$ 12,812.50
H.L. Montague		134.25	13,425
	TOTAL:	236.75	$ 26,237.50
(j) General			
David Berger		29.05	$ 3,631.25
H.L. Montague		65.05	6,505
Herbert B. Newberg		60.00	6,000
Warren D. Mulloy		.75	75
	TOTAL:	154.85	$ 16,211.25
(k) Fee agreements and interventions			
Herbert B. Newberg		10.0	$ 1,000
	TOTAL:	10.0	$ 1,000
TOTAL (a) through (k):		3577.75	$352,765.75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al., Plaintiffs, v. GRINNELL CORPORATION, et al., Defendants.	68 CIV. 4026 (E.D. Pa. Civ. 68-1478)

PREHEARING MEMORANDUM OF OBJECTORS BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, GARDEN STATE PLAZA CORPORATION, INTERNATIONAL LUBRICANT CORPORATION AND SHELL OIL COMPANY

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Washington, D.C. 20006

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BAY FAIR SHOPPING CENTER, et al.

Dated: October 30, 1975

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PREHEARING MEMORANDUM OF OBJECTORS BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, GARDEN STATE PLAZA CORPORATION, INTERNATIONAL LUBRICANT CORPORATION AND SHELL OIL COMPANY

I. PRELIMINARY STATEMENT

This prehearing memorandum is submitted by certain class members (hereinafter "Objectors") who opposed the initial fee application of Counsel for the Class Representatives (hereinafter "Petitioner"). Pursuant to the Court's directive of September 25, 1975, all submissions prior to the evidentiary hearing scheduled for November 10, 1975, were to be served and filed simultaneously.[1/] Accordingly, this prehearing memorandum will address primarily the legal guidelines which govern the disposition of this matter on the basis of the record of the evidentiary hearing for which the Court of Appeals remanded in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) (hereinafter referred to as "Grinnell" unless specific reference is made to other decisions in this litigation).

The unanimous decision of the Court of Appeals in Grinnell relied extensively on Lindy Bros. Builders, Inc. v.

1/ Petitioner has served on counsel for Objectors a proposed "Brief Statement Of Facts Which Petitioner Proposes To Prove In Support Of Its Claims." By letter of October 17, 1975, counsel for Objectors agreed not to dispute certain basic facts asserted therein in order to expedite the evidentiary hearing. However, counsel for Objectors cannot stipulate to any facts on behalf of the class which they do not represent.

American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (hereinafter referred to as "Lindy Bros." unless specific reference is made to the District Court decisions in that litigation). Lindy Bros. also vacated a fee award made to Petitioner and another attorney in the multidistrict Plumbing Fixtures litigation, and likewise remanded the matter for an evidentiary hearing.[1/] Because of the Court's heavy reliance in Grinnell on Lindy Bros., these decisions together set forth the appropriate criteria to be employed in making fee awards, and have become leading authorities in this area.[2/]

II. THE INTERESTS OF THE CLASS MEMBERS ARE PARAMOUNT TO PETITIONER'S

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), in reliance on Grinnell and Lindy Bros., also reversed a fee award made to Petitioner Berger. Additionally,

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1/ Subsequent to remand, the District Court entered a second fee award, Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 382 F. Supp. 999 (E.D. Pa. 1974), from which an appeal was taken by certain class members on the ground that this fee award is also excessive. The Court of Appeals for the Third Circuit heard argument in the second appeal on September 8, 1975, and reserved decision.

2/ In NBO Industries Treadway Co. v. Brunswick Corp., 1975-1 Trade Cas. ¶ 60,479, at 67,129 (3d Cir. 1975), the Court of Appeals recently made it clear that the standards governing fee awards promulgated in Lindy Bros. are applicable both to settled class actions and litigated antitrust cases.

the Court of Appeals stated: "Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of the absent class members." Id. at 123. Similarly, in Grinnell, the Court of Appeals held that a court of equity can award fees from a class' settlement fund only "with an eye to moderation." 495 F.2d at 470. The Court specifically addressed the sensitivity surrounding fee awards made in settled class actions:

> The practice of awarding attorneys' fees is one that has been 'delicate, embarrassing and disturbing' for the courts. * * * This embarrassment is rooted in the fact that the 'bitterest complaints [about the legal profession] from laymen [are directed at] the windfall fees and featherbedding that lawyers have managed to perpetuate . . . with their influence with the judiciary.'
>
> * * *
>
> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. To this end, courts must always heed the admonition of the Supreme Court * * * when it advised that fee awards under the equitable fund theory doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund.' 495 F.2d at 469. (Citations omitted.)

The Court of Appeals specifically rejected the percentage or contingent-fee approach in finding that the initial

fee award made in this case was excessive. 495 F.2d at 468. Directly contrary to the percentage approach to fee awards, Grinnell adopted the rule promulgated in Lindy Bros. which held that the initial step in making a fee award is to determine the reasonable value of the legal services rendered by applying the attorneys' normal billing rates to the time claimed. Significantly, in Lindy Bros., the Court of Appeals specifically emphasized that the sole purpose of a fee award made out of the shares of a settlement fund under a court's equitable protection is only "to compensate the attorney for the reasonable value of the services" expended in the class' behalf. 487 F.2d at 167. Hence, the Court of Appeals admonished the District Court as follows:

> [T]he court must keep in mind that the attorney will receive . . . reasonable compensation for his time under the figure arrived at under the hourly rate. 487 F.2d at 168.

In short, only reasonable fees circumscribed by the time expended and the attorney's normal billing rates can be awarded under the standards laid down by Grinnell and Lindy Bros., though other factors which will be discussed below may also be given some consideration. Finally, fees can be awarded only for the time claimed which conferred an "identified benefit" on the class. In interpreting Lindy Bros. in its first decision in Merola v. Atlantic Richfield Co., 493 F.2d 292,

298 (3d Cir. 1974), the Court of Appeals for the Third Circuit specifically endorsed "benefit analysis" as the "quasi-jurisdictional predicate" of any fee award; i.e., unproductive time or time expended on activities antagonistic to the class' interest cannot be considered in making fee awards.

III. THE COURT'S LODESTAR DETERMINATION

The basic task confronting this Court in making what the Court of Appeals described in Lindy Bros. as the "lodestar" determination is calculating the amount of fees which constitute reasonable compensation for Petitioner's claimed time on an hourly basis. 487 F.2d at 168. This initial determination is two-pronged: First, Petitioner has the burden of sponsoring his time claims with acceptable evidentiary proofs; secondly, the Court must determine and apply the attorneys' normal billing rates to the hours expended which actually conferred a benefit on the class.

(a) Petitioner's Time Claims Must Be Supported With Acceptable Evidentiary Proofs

Because of the importance of the time factor in making fee awards under the rules of Grinnell and Lindy Bros., in Merola, supra, 493 F.2d at 296, n. 14, the Court of Appeals held that

where a fee applicant fails to support his time claims with adequate evidentiary proofs, no fee award can be made:

> Given the inadequacy of the proofs, had defendant-appellee not conceded that 264.2 hours were spent, there might have been insufficient evidence to make any finding regarding the time spent.

Here, Petitioner's time claims are very much in dispute in view of the significant gaps in his record keeping procedures and the absence of contemporaneously generated records for much of the time which apparently will be claimed.

In his deposition of April 25, 1973, taken in the Plumbing Fixtures litigation, Mr. Berger gave the following sworn testimony pertaining to virtually the identical period of time for which fees are claimed in this case: "I found I was too busy to keep these time records" (Berger dep. tr. 60). Additionally, Mr. Montague of that office submitted an affidavit in that case in which he stated as follows: "From September 1967 until April 1972, he [Mr. Berger] rarely kept time records" (Montague Affidavit, subscribed to on January 31, 1974, Par. 9). Also, for a period of time Petitioner's office had "no uniform procedure for maintaining time records" (id, Par. 4). Additionally, from October 1970 until February 1972, Mr. Newberg apparently did not maintain contemporaneous time records (id., Par. 10), although Petitioner apparently claims that Mr. Newberg expended 714.50 hours on the Grinnell case. Despite the

apparent lack of contemporaneous time records during the period of time in which services are claimed on this case, Mr. Berger made the following sworn claim in his affidavit of April 20, 1972, filed in support of his fee application in this Court: "From July 1, 1968 through April 19, 1972, Messrs. Berger, Montague, Schambelan and Newberg, senior attorneys in David Berger, P.A., spent a total of 1,814 hours [on the Grinnell case]" (Par. 44).[1/]

The necessity for an attorney who intends to petition for a fee award to maintain and support his time claims with contemporaneous time records is not novel, and does not have its genesis in Lindy Bros., Merola, or Grinnell. To the contrary, over a decade ago, in In re Hudson & Manhattan Railroad Co., 339 F.2d 114, 115 (2d Cir. 1964), then Chief Judge Lumbard stated:

> We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current time records of work done and time spent. * * * There is no excuse . . . to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect the court to do so.

1/ Incredibly, Mr. Berger swore in his prior affidavit that Mr. Schambelan was a "senior attorney" in 1972 even though that was apparently the first year he was admitted to practice according to Exhibit B of the Brief Statement Of Facts Which Petitioner Proposed To Prove In Support Of Its Claims.

Similarly, in In re Wal-Feld Co., 345 F.2d 676, 677 (2d Cir. 1965), Judge Lumbard again stated:

> We recently held that a law firm was not entitled to the full amount which it sought for its services . . . because the firm had failed to keep accurate time records.

More recently, in Lewis v. Wells, 325 F.2d 382, 387 (S.D.N.Y. 1971), Judge Weinfeld commented: "Surely daily registers are still maintained in law offices." (Footnote omitted.)

Hence, the law is clear that a fee applicant must support his time claims with adequate time records: Both In re Hudson & Manhattan and Wal-Feld have been the law of this Circuit for over a decade. Additionally, in view of the Court of Appeals' specific warnings in remanding this case in Grinnell that fee awards should be made "'with moderation and a jealous regard to those who are interested in the fund'", 495 F.2d at 469, this court of equity should minutely scrutinize the very specific time claims made by Petitioner in view of admitted gaps in his time keeping procedures and the absence of contemporary time records for significant periods of time. Because of the direct conflict of interest between Counsel for the Class Representatives and the class on fee matters, Petitioner's time claims are, at best, self-serving. As the District Court found in its initial fee decision in the Plumbing Fixtures litigation which was reserved in Lindy Bros., the fee application filed

in Mr. Berger's behalf "can hardly be characterized as modest" and was "quite obviously colored by considerations of self-interest." 341 F. Supp. at 1089.

(b) Only Petitioner's Normal Hourly Rates Can Be Assessed Against The Class For Hours That Actually Benefitted The Class

Just as a court of equity must make certain that a fee award does not unjustly dissipate a class' settlement fund because of inflated time claims not supported by adequate evidentiary proofs, it must also be vigilant in guarding against the possibility that excessive hourly rates will be applied to the time claimed. Thus, the Court of Appeals in Grinnell stated that in making its lodestar determination, the District Court must start with the following premise: "[T]he value of an attorney's time generally is reflected in his normal billing rate", 495 F.2d at 473; i.e., the normal billing rate of Petitioner and members of his office.

On May 1, 1974, counsel for Petitioner in the Plumbing Fixtures litigation proposed certain hourly rates for the attorneys in Petitioner's office practicing in Philadelphia which are set forth in the District Court's second fee opinion, and which that Court specifically found were "reasonable hourly rate[s]" for

attorneys in Petitioner's office.[1/] 382 F.2d at 1006. It is respectfully submitted that the findings of the District Court of the Eastern District of Pennsylvania in which Petitioner practices and the District in which the complaints in this case were filed by Petitioner are the maximum hourly rates which can be applied in this case.

Any contrary contention that higher hourly rates than those claimed by Petitioner himself this past year in his home forum could be applied is an affront to this Court sitting in equity and would result in a dissipation of the class' settlement fund under the Court's protection. Objectors point out that while apparently the same hourly rate for Mr. Berger as that claimed in the Plumbing Fixtures case will be claimed here for him, substantially higher rates for at least two members of Mr. Ber 's office, namely, Messrs. Newberg and Montague, will be sought in this case; i.e., $70 per hour was claimed last year for their time in the Plumbing Fixtures litigation, and apparently $100 per hour will be claimed for their time in this case. This is indeed ironical since throughout this past year, no significant work could have been expended by these attorneys on this case. In fact, Mr. Newberg left the Berger office in April 1972 (Newberg dep. of April 25, 1973, at 3).

1/ Of course, those rates having been proposed by counsel for Petitioner, no issue has been raised by Petitioner in the appeal now pending in the Third Circuit as to the inadequacy of those rates.

Just as undoubtedly Petitioner's office does not charge lower hourly rates when it litigates in areas outside of Philadelphia where prevailing hourly rates may be lower, there is no legitimate basis for a claim that because Petitioner's cases filed in Philadelphia were transferred to this District, a higher hourly rate can be properly assessed against the class' settlement fund. Concededly, Petitioner's out-of-pocket expenses, for which he will be reimbursed, may have been greater because these cases were transferred to this District. However, Petitioner performed the claimed services on this case at his offices in the City of Philadelphia: Petitioner did not incur the overhead such as possibly higher salaries, taxes, rent, and utility costs which may result in higher hourly rates being charged in New York than in Philadelphia.

The Court of Appeals in Grinnell also held that different hourly rates may be appropriate for different categories of activity for which time is claimed. In fact, the Court specifically stated: "It is conceivable that large amounts of time could have been spent on comparatively routine matters or in ministerial duties." 495 F.2d at 473. The Court of Appeals made this admonition because it was well aware of the ministerial tasks performed by Counsel for the

Class Representatives in settled class actions. In Philadelphia v. Chas Pfizer & Co., 345 F. Supp. 454, 485 (S.D.N.Y. 1972) -- decided prior to the new fee standards promulgated in Grinnell -- Judge Wyatt had stated:

> A considerable amount of time must have been spent in processing consumer claims; while this had to be done by somebody, it is not work requiring any great amount of professional skill.

In this case, significant amounts of time will apparently be claimed by so-called "senior attorneys" on routine matters. Mr. Berger himself claims approximately 50% more time on "settlement administration" than on "settlement negotiations." Additionally, approximately six times the number of hours are claimed by attorneys in Petitioner's office for "settlement administration" than for "settlement negotiations." Of the 1,342.5 hours claimed for "settlement administration" by attorneys in Petitioner's office, virtually 65 percent -- or almost 900 hours -- are claimed by attorneys whose time Petitioner seeks to have assessed against the class' settlement fund at $100 per hour or more. Clearly, this is the type of routine, administrative-ministerial duties which the Court of Appeals held should be taxed against the class at relatively low hourly

rates.[1] Objectors suggest it would be inequitable to assess the class members with rates in excess of 50% of those normal billing rates applied by the District Court in the Plumbing Fixtures litigation.

Also, the overwhelming portion of the time claimed by Petitioner in this case is the time of paralegal assistants (almost 6,000 hours). Relying on this Court's holding in Trans-World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 482 (S.D.N.Y. 1970), mod. on appeal, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973), that attorneys' fees cannot be awarded for the services of laymen, the Court of Appeals in Grinnell made it unequivocably clear that the paralegal time claimed by Petitioner can only be treated as an out-of-pocket expense:

> The court will need to know the experience and training of petitioner's paralegal assistants and the rate at which he pays them since he must be reimbursed for their wages even though their time cannot be considered as input in the fee determination. 495 F.2d at 473.

Apparently, Petitioner will claim that he incurs a cost of $9.00 per hour for his paralegals' time. Accordingly, Petitioner

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1/ In his original affidavit filed in support of his fee application, Petitioner described the work required in processing claims as follows: "Many challenges required mathematical calculations" (Par. 22).

can be reimbursed for paralegal time only at the rate of $9.00 per hour.

Finally, Petitioner can be reimbursed only for his time claimed which actually conferred an identifiable benefit on the class. Hence, for example, time claimed in negotiating fee arrangements, on interventions, or on applications for fees which was directly antagonistic to the class' interest, cannot be assessed against the class.

IV. THE OTHER FACTORS TO BE CONSIDERED BY THIS COURT

The Court of Appeals noted that subsequent to the determination of the amount of fees which otherwise constitutes reasonable compensation for Petitioner's claimed services to the class made in its "lodestar" determination, other factors may be considered. These other factors addressed in Grinnell are classified in two basic categories: (a) The risk of litigation; and (b) the quality factor.

(a) The Risk of Litigation

Significantly, the Court of Appeals placed primary reliance on the "risk of litigation" factor as the "foremost" element which might justify a modification of the fee determined to constitute reasonable compensation on an hourly basis:

> Perhaps the foremost of these factors is the attorney's 'risk of litigation,' i.e., the fact that, despite the most vigorous and competent of efforts, success is never guaranteed. The greater the probability of success, of either ultimate victory on the merits or of settlement, the less this consideration should deserve to amplify the basic hourly fee. The tangible factors which comprise the 'risk of litigation' might be determined by asking the following questions: has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and are the issues novel and complex or straightforward and well worn? 495 F.2d at 471. (Emphasis supplied.)

This Court is most familiar with all aspects of this litigation. Without question, following in the wake of the Government's success, the risk of non-settlement of these national class actions was de minimus. In its initial fee decision, this Court noted that in setting a fee, "the existence of the government investigation and the existence of a judgment available for use under § 5(a) of the Clayton Act are factors to be considered." City of Detroit v. Grinnell Corp., 355 F. Supp. 1380, 1382 (S.D.N.Y. 1972), rev'd on other grounds, 495 F.2d 448 (2d Cir. 1974). However, in Grinnell, the Court of Appeals established as the law of the case that the existence of the prior Government action and its successful termination against the defendants are of critical importance in determining whether the fee determined on the hourly basis can be increased, and are not just "factors to be considered."

Similarly, this issue was specifically addressed in Lindy Bros., in which the Court found that the progress of a prior Government action is generally the most important factor in evaluating the probability of successful termination in "taga-long" civil antitrust actions. Hence, the Third Circuit concluded: "The court may find that the contingency was so slight . . . that an increase for the contingent nature of the fee would be minimal." 482 F.2d at 168. In fact, the likelihood of nonsettlement in this case was so minimal that pending resolution of the class issue under Rule 23 after it had been briefed and argued, Petitioner and defendants requested this Court to refrain from deciding the matter because of their on-going settlement negotiations.

In addition to the existence of a successful prior Government action, the Court of Appeals noted that the existence of other civil actions is also an element in evaluating the "risk of litigation" or the likelihood of non-settlement in multi-district litigation. In its initial fee decision, this Court recognized that following on the heels of the Government's success, "a slew of private actions were then instituted seeking treble damages from the four defendants." 356 F. Supp. at 1383. In In re Protection Devices and Equipment, Inc., 295 F. Supp. 39 (J.P.M.L. 1968), the panel noted that of the 80 cases then pending, only four were filed after July 17, 1968. Petitioner's

instant actions were filed on July 10 and 11, 1968, a year to the day following the final order in the Government's case, and seven years after the Government commenced its action.

In short, Petitioner's class actions were virtually the last suits instituted in this litigation. Moreover, it is undisputed that these class actions had their origin not in Petitioner's genius or vigilance in the class' behalf, but rather in a chance meeting at a law school alumni reunion of one of Petitioner's employees and an attorney for a subscriber plaintiff who had previously commenced an action (Affidavit of Herbert Robinson, sworn to on May 8, 1972, Par. 6, page 6). Accordingly, in its initial fee decision, this Court modestly stated:

> [T]he existence of this number of individual suits, many instituted more than a year prior to these class actions, somewhat diminishes credit to counsel for having the foresight to bring the suits. 365 F. Supp. at 1391.

Under the criteria established as the law of the case in Grinnell, the "foremost" of the factors which the Court of Appeals held might justify an increase of the fee determined for Petitioner on an hourly basis was de minimus at best under the circumstances of this litigation.

(b) The Quality Factor

Traditionally, counsel seeking fees from a settlement fund often placed great reliance on the size of the recovery in

an effort to increase their fee awards. However, this approach to fee awards was unequivocally rejected in Grinnell, and the Court of Appeals specifically held that it was "minimizing the important role traditionally played by the magnitude of the recovery." 495 F.2d at 471. Petitioner conceded that this is, in fact, the holding of Grinnell in his Petition Of Counsel For Class Representatives-Appellee For Rehearing And Suggestion For Rehearing In Banc dated March 27, 1974 (at 6), which was denied by the Court of Appeals (hereinafter referred to as "Petition For Rehearing." Hence, just as with the "risk of litigation" factor, any argument that the size of the recovery warrants an upward adjustment of the fee determined for petitioner in this Court's "lodestar" determination was laid to rest by the Court of Appeals in establishing the law of the case.

Moreover, the facts of this case would not justify an increase in the fee determined for Petitioner on an hourly basis because of the result achieved in this case or the quality of Petitioner's claimed services. The incisive comments of Judge Wyatt in Pfizer, supra -- a pre-Grinnell case -- are apropos here:

> That Kohn [Mr. Berger's co-counsel in that case] single-handedly negotiated the $20,000,000 settlement offer with defendants does not, however, suggest a generous treatment of his present petition. * * * [C]ounsel other than Kohn later succeeded in negotiating a far better settlement offer from defendants than Kohn had done. 345 F. Supp. at 469.

Similarly, counsel for plaintiffs who opted out of the class settlement reached by Mr. Berger subsequently succeeded in obtaining substantially better settlements on behalf of their clients, as reflected in Exhibit A hereto, a chart previously tendered to this Court by defense counsel and which reflected outstanding offers made to those non-settling parties. Also, the final settlements received by some of those plaintiffs were in excess of the offers contained in Exhibit A. 1/

Moreover, the quality of Petitioner's work was questioned in this District by Judge Wyatt in Pfizer, supra:

> I am not able to point to any contribution made by the Berger firm; my recollection of the paper record is that it reveals activity of the Berger firm only in respect of attempted interventions. As to such attempted interventions, hours spent in such work, whether by the Berger firm or the Kohn firm, ought to be disregarded because there is never any reason for it and, aside from the question of necessity, the work in connection with interventions was poorly performed. 345 F. Supp. at 484.

Here, other attorneys have taken issue with the claims made by Petitioner as to his services rendered in furthering the disposition of this case. For example, Paragraphs 3-14 of the affidavit of Joel E. Hoffman, subscribed to in May,

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1/ Additionally, according to the conservative estimates of the defendants, total purchases by subscribers approximated $800 million (Defendants' Memorandum, page 11). Assuming a 15% average overcharge, defendants were subject to single damages of $120 million, or treble damages of $360 million plus attorneys' fees; thus, the class settlement of $10 million is not a phenomenal or exceptional settlement.

1972, disputes the role claimed by Petitioner on the statute of limitations issue.[1/] Additionally, a group of attorneys comprising the so-called "Troika" took issue with the contributions claimed by Petitioner (see the Robinson, Stein and Victor affidavits), and presumably their views will be presented to the Court by those counsel at the November 10, 1975 hearing. In fact, according to the uncontroverted statements in the heretofore mentioned Robinson affidavit, Petitioner did not even draft the complaints in the class actions he filed, but rather, with minor exceptions, they are "picture copies" of the complaints previously filed and supplied to Petitioner at his request (Robinson affidavit, Par. 11).

Apparently this Court also has reservations about the contribution of Petitioner in advancing the class' interest in this case. In its initial fee decision, the Court ruled that a hearing would be held on the claims of other attorneys that they furthered the class' interest although only Petitioner served as Counsel for the Class Representatives.[2/] Now that Petitioner's time claims

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1/ Objectors understand that Petitioner made a substantial payment to Mr. Hoffman as a quid pro quo for his withdrawal from these present proceedings.

2/ Objectors vigorously oppose any dissipation of the settlement fund by the payment of windfall fees to attorneys for other litigants who have already been paid for their efforts in representing their clients' interests. In every multi-party litigation other parties benefit from the efforts of counsel who takes the laboring oar on any particular phase of the litigation. Rule

have been particularized, this Court's reservations have been borne out. For example, Petitioner will apparently claim that his office spent more than twice as much time in preparing Petitioner's initial fee application as on all other pleadings and motions throughout the entire course of this litigation. Further, Mr. Berger himself apparently will claim that he spent more time on "settlement procedures" than on any other activity, and almost three times as much time as the 53 hours claimed for settlement negotiations with the defendants.

Accordingly, there is no basis in this record which would justify any increase in the fee determined for Petitioner on an hourly basis, under both the law of the case established by the Court of Appeals in Grinnell and the facts of this case. If, in arguendo, this Court were to find that some aspect of Petitioner's activities involved such "unusual degree of skill" and was of such "atypical quality" as to warrant some award over and above the amount found to constitute reasonable compensation in its "lodestar" determination, that increase must be directly related to the amount of time devoted to that

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(footnote continued from preceding page)

23 was intended to benefit the class members whom the Government proved were injured in this case, and not as a vehicle for rewarding attorneys such as the Troika with windfall fees over and above those for which they contracted with their clients to enter this litigation.

given activity such as Mr. Berger's 53 hours devoted to settlement negotiations. Lindy Bros., supra, 487 F.2d 168-169. Hence, even were this a case in which an increase in the fee determined on an hourly basis was appropriate, an across-the-board increase would be improper, and factual findings would have to be made as to the atypical quality of Petitioner's work by each given category of activity. Lindy Bros., supra, at 169.

Undoubtedly, the plaintiff's bar is not pleased with the new fee standards promulgated in Lindy Bros. and adopted by Grinnell, which one commentator has characterized as "revolutionary".[1/] However, even Petitioner has recognized that the law of the case established in Grinnell necessitates that any fee award made by this Court be tightly circumscribed by the hours claimed and the normal billing rates of the attorneys in Petitioner's office. Thus, in his unsuccessful Petition For Rehearing filed in the Court of Appeals, Petitioner specifically recognized that the Court of Appeals in Grinnell adopted the new fee standards promulgated in Lindy Bros.:

> In this panel's opinion, the Court requires district judges when awarding attorneys' fees in private antitrust class actions to give primacy to the number of hours expended and typical hourly rates . . . (Petition For Rehearing, at 1).

* * *

1/ Brodsky, "Attorneys' Fees in Class Actions," 170 N.Y.L.J., No. 107 (Dec. 5, 1973), at 1.

> The Court held that the primary factors to be considered in setting reasonable attorneys' fees in complex antitrust class actions were the hours spent on the case and the hourly rate attorneys of like skill typically charge for similar work (id. at 6).

In this case, in view of the fact that there was virtually no "risk of litigation" or of non-settlement of this case and Petitioner cannot demonstrate that any other factor warrants an increase in the fees determined on an hourly basis, only those fees can be awarded in accordance with the mandate of Grinnell. The fee determined on an hourly basis rewards Petitioner with very handsome compensation for his services in this matter. As Judge Will stated in his persuasive decision in Leibman v. Peterson Coal Co., 63 F.R.D. 684, 701-702 (N.D. Ill. 1974):

> [W]e find it difficult to believe that skilled lawyers will be unwilling to serve the public interest and pursue the rights of class members under a fee formula which results in the kind of allowances represented herein. If the present plaintiff class action bar can find richer rewards elsewhere, we have no doubt that other competent counsel will step forward.
>
> * * *
>
> No private attorney in this case can seriously contend that the hours and rates are inaccurate or unfair. The only possible basis for attacking the allowances is that a higher than normal rate should be allowed routinely in class actions or that the amount recovered should govern regardless of time devoted or services rendered.

The rates applied by Judge Will were significantly lower than those applied in the Plumbing Fixtures case to attorneys in Petitioner's office, and the class in this case was entitled to expect to receive high quality services because those rates are so generous.

CONCLUSION

For all of the foregoing reasons, this Court should determine whether Petitioner can support any or all of his time claims with acceptable evidentiary proofs, and award fees for attorneys' time only on the basis of the hourly rates requested by Petitioner and found to constitute reasonable compensation for his services in the Plumbing Fixtures litigation; Petitioner should be reimbursed for the time claims of his paralegals which can be supported with acceptable evidentiary proofs at $9.00 per hour.

Respectfully submitted,

WILLIAM SIMON
G. JOSEPH KING
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Claimants-Objectors
BAY FAIR SHOPPING CENTER, et al.

Dated: October 30, 1975

EXHIBIT A

MOST FAVORABLE SUBSCRIBER SETTLEMENT BASIS APPLIED TO PENDING CASES

	Paid To (1957-68)			Total Paid All Defendants	Better of 60/80 or 10%	Percentage of Total Paid
	ADT	AFA	Holmes			
Allied Stores	$2,731,994	$ 118,508	$ 20,308	$2,870,810	$ 344,000	12%
Arlan's	179,107		100,216	279,323	59,000	21%
Asscciated Dry Goods	1,436,551			1,436,551	204,000	14%
Berkey Photo	118,461	2,292	13,240	133,993	24,000	18%
B.V.D.	108,619	6,033		114,652	19,000	17%
City Stores	1,725,248	225,528		1,950,776	312,000	16%
Cunningham Drugs	90,273			90,273	20,000	22%
Federal's Dept. Stores	258,762			258,762	27,000	10%
Federated Dept. Stores	2,312,048	17,257		2,329,305	280,000	12%
Gimbel's	731,138	237,474		968,612	97,000	10%
Grand Union	242,832	1,254	13,127	257,213	64,000	25%
W.T. Grant	177,064	11,376		188,440	40,000	21%
Hutzler Bros.	322,854			322,854	46,000	14%
Interstate Dept. Stores	803,447			803,447	138,000	17%
S. Klein	297,617	7,652		347,413	56,000	16%
Lerner Stores	87,024	15,863	27,880	130,767	26,000	20%
Macy's	2,186,721	317,839	213,202	2,717,762	390,000	14%
McCrory's	218,848	13,075	3,438	235,364	33,000	14%
Montgomery Ward	1,004,510			1,004,510	162,000	16%
J. C. Penney	1,077,618	23,896		1,101,514	198,000	18%
Rapid American	79,741	6,037		85,778	13,000	15%
Shoe Corp.	176,650	948		177,598	32,000	18%
Spartan's	1,443,391			1,443,391	145,000	10%
Walworth	122,976			122,976	23,000	18%
Zale	187,387	7,390		194,777	25,000	13%
Zayre	1,095,170		17,846	1,113,016	245,000	22%
Federal Reserve Banks	680,000		57,916	737,916	162,000	22%
State of Conn., N.J. and Md. Classes				Unknown	Unknown	
				$21,417,793	$3,184,000	Avge. 15%

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els

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, Plaintiff, vs. GRINNELL CORP., Defendant.	68 Civ. 4026 68 Civ. 4027 68 Civ. 4028

Before:

HON. CHARLES M. METZNER,
District Judge.

New York, November 10, 1975;
10.15 o'clock a.m.
(Room 2703)

APPEARANCES:

DAVID BERGER, Esq.,
H. LADDIE MONTAGUE, JR., Esq.,
Attorneys for Plaintiff

BY: LORD, DAY & LORD, Esqs.,
Counsel for Class Representatives

BY: GORDON SPIVACK, Esq.,
THOMAS BRISLIN, Esq.,
Of Counsel.

HOWREY & SIMON, Esqs.,
Attorneys for Defendant

BY: G. JOSEPH KING, Esq.,
WILLIAM SIMON, Esq.,
Of Counsel.

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(Case called.)

THE COURT: Mr. Spivack, will you proceed.

MR. SPIVACK: Yes.

Mr. Monqague, please.

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H. LADDIE MONTAGUE, JR., called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPIVACK:

Q Mr. Montague, will you please state your address and present position for the record?

A Yes. My home address is 239 South 4th Street in Philadelphia. My office address is ~~1266~~ 1622 Locust Street, Philadelphia. And I am an attorney with David Berger, PA.

Q Mr. Montague, on October 28, 1975 did you execute an affidavit which was filed with the Court in connection with the petition for Attorneys' fees?

THE COURT: I am sorry, I didn't get the date. Would you rise, please, Mr. Spivack.

MR. SPIVACK: Yes, your Honor.

THE COURT: What is the date?

MR. SPIVACK: October 28, your Honor.

A Yes, I did.

Q Are the statements in that affidavit true?

A Yes, they are.

MR. SPIVACK: No further questions.

THE COURT: Any cross-examination?

MR. KING: Your Honor, I am Joe King, appearing today on behalf of Bay Fair Shopping Center. Mr. Simon probably will join us later in the proceedings, if you have no objection.

THE COURT: No.

CROSS EXAMINATION

BY MR. KING:

Q Mr. Montague, you state in your affidavit that for certain periods of time the firm of David Berger, PA has not maintained uniform timekeeping records.

THE COURT: Pardon me. I think that the original should be offered as an exhibit.

Is it on file?

MR. SPIVACK: Yes, your Honor.

THE COURT: Mark this Exhibit 1.

(Plaintiff's Exhibit 1 was received in evidence.)

Q You state, for example, at the last sentence of Paragraph 4, page 3 of your affidavit that during the period September, 1970 through February, 1971 individual

attorneys' time records are sporadic. Did you reconstruct or was time reconstructed under your direction for that period of time for this case?

A Some time was reconstructed for Mr. Berger during that period of time. Some time was reconstructed for myself during that period of time by me, and Mr. Berger's time was reconstructed by myself and himself together. And Mr. Newberg, to the extent that he reconstructed his time, did so himself during that period.

However, the time that was reconstructed did, in my belief, did not accurately reflect all the time which we spent. I believe that there were many more hours that, if we had kept records, would have been included during that time period.

So that what we did reconstruct was on an extremely conservative basis.

Q Were you yourself active in this particular case during that period of time?

A Yes, I was.

Q What activities did you personally engage in in this case during that period of time?

A Beginning October --

Q September, 1970, approximately, through February, 1971.

A During that period of time I was -- I believe that was after the statute of limitations summary judgment motions had been dispensed with. Prior to that time I had been very active in those motions. After that time I was active in discovery to the extent of reviewing discovery produced by the defendants, and I believe also procuring answers to interrogatories by our clients.

Beginning in October of 1970 I believe I started working on the legal papers for the class action issue, which included a brief and an affidavit in support of the classes, which was eventually filed in January of 1971. But I believe the bulk of my work in that was completed -- I had a rough draft done before the end of November, and that we finalized it during the month of January.

Q That dealt with the class action issue?

A That's correct. And then I believe -- I forget exactly when the defendants filed their briefs in response to our class action brief, but after that I was the principal drafter of our reply brief.

Q When did you reconstruct time for that.

A All the time was reconstructed by me back in 1972.

Q Approximately what period of time?

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A When I reconstructed it?

Q Yes.

A Oh, I would say probably somewhere between January and April. I really don't remember when. Probably -- well, in that time.

Q Did you reconstruct the time in such a manner as to come up with a specific number of hours only, or did you also describe the activity for that time you reconstructed?

A I don't understand your question.

Q Did you go back, for example, to pick a month at random in say, December, 1970, 34 hours; or did you say December, 1970, four hours meeting with plaintiff's counsel --

A Who are you talking about? Myself or Mr. Berger?

Q Yourself. The time you reconstructed for yourself.

A Okay.

The only time that was reconstructed by myself -- if I could have my affidavit I could point it out to you and explain it with more particularity.

(Pause.)

If you will turn to page 10 of my affidavit at

Paragraph 13-B --

THE COURT: It is 14-B. Page 10 starts with Paragraph 14.

THE WITNESS: I am sorry, your Honor. It was hidden by the staple. Thank you.

Paragraph 14-B on page 10 you will see that there are 65 hours which I have reconstructed. They are not reconstructed by day, they are not reconstructed by month. They are reconstructed by event. It would be impossible for me to know which day I spent those hours. I also believe that this is - the hours reflected on Paragraph 14-B are actually much less than I actually spent. But they were a conservative reconstruction going over what I did, what I had time sheets for and what I didn't have time sheets for; and knowing the services that I performed.

I felt that this was a very conservative estimate of the hours I spent on those events.

Q How exactly did you go about coming up with the figure of 30 hours for directing settlement orders number 1 and 2 in class action notice?

A I looked at the number of drafts we had and the correspondence going back and forth between the defense firms and ourselves, and based on the estimate of how I do

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work and the speed at which I do work and knowing what's involved in these sort of things, I thought that was a very conservative estimate.

Q Was there anything novel about settlement orders numbers 1 and 2 from other settlement orders that you had drafted during the course of your career with Mr. Berger's firm?

A Well, Mr. King, I would say yes, because every settlement order is novel. I don't think there was -- this certainly was not a boiler plate settlement -- I don't know if there is a boiler plate settlement -- but this was not taken strictly from any other. The terms of the settlement were different from any other settlement.

The defendants wanted certain things; we wanted certain things; the Court wanted certain things. The class action notice had to be different.

I don't think that our class action notice here was a very ~~broad~~ routine notice, and I -- this was not the sort of thing that I just run off on a machine, if that is what you are looking for.

Q Did you have any work papers or scratch sheets upon which you based these estimates that you employed during coming up with the reconstructed hours?

A Yes. I said I had all the drafts of the

various stages of the settlement order and the class notice. I had the correspondence, and I probably had some -- you know, my own notes written on them. I don't have them with me.

Q But other than the documents in the case do you have any work sheets showing how you arrived at the hours you reconstructed?

A You mean how I calculated the hours?

Q Right.

A No, I don't believe I do.

Q Did you create at the time?

A I believe I did.

Q They are no longer in existence; is that correct?

A They may be. I don't have them with me if there are.

Q Did you make any modification to the hours you originally arrived at when you reconstructed the time for yourself, upon discussion with anyone else?

A Of here?

Q Yes.

A No, I don't believe so.

Q Did you discuss the hours you reconstructed in Paragraph 14-B with anyone else?

A Well, after I arrived at them I disclosed what they were, but I arrived at them by myself.

Q Who asked you to engage in this reconstruction?

A Nobody. I did it on my own.

Q For what purpose?

A For the purpose of this affidavit -- well, no. What I did it -- well, when we originally filed our fee petition we wanted to know an estimate of the total hours that were expended on the case.

Q So you --

A No, let me finish, please.

Q Sorry.

A We needed to get that information back in 1972 and it was at that time that I made a reconstruction of where I thought hours were missing, so we could get a ball park figure.

Q You didn't reconstruct hours for all of the matters upon which you had expended time?

A Mr. King, the 65 hours are basically the only hours included in the petition for me where there are not time sheets, I think with perhaps four exceptions -- about four exceptions listed in Exhibit B where the hours were taken from either notes of meetings which I attended or were taken from a transcript where it shows I was present;

I knew I was present but I didn't have a time sheet for it.

Q Did you consider what activity you expended or time you expended on other cases during this period of time for which you were reconstructing time for the Grinnell case? Did you consider, for example, time expended on the Lindy Brothers case or any other case in which you were engaged?

A Yes -- well, yes and no. I would say incidentally. I knew what I did in this case. This was one of the cases which I was very actively involved in, and I am very familiar with what I did. I know the role that I played, I know the work that I did, so it was relatively easy for me to go back to the papers and see what I did and estimate the time that I took, you know, in the drafting of the settlement orders. The settlement was agreed to in August and the papers to present to the Court were -- I don't believe they were -- they were basically finalized in November, when we had a meeting, I believe we had a meeting with Judge Metzner and he wanted some additional changes, and they were changed some more and we finally presented them to the Court in December. So that 30 hours goes over a several month period.

Q In either reconstructing this time or other time in your affidavit for which you have records is it

true that on some days you have logged as many as 15, 16, 17 hours per day?

A I don't know whether that is true in this case. I imagine it might be on certain days, but that wouldn't be unusual.

Q It would not be unusual for you to claim that much time in one day?

A If I spent that much time in one day, I claimed that much time in one day. And it's not unusual for me to spend that much time in one day.

I might say that is true of the other attorneys in our firm also.

Q Did you engage in settlement negotiations with defendants, Mr. Montague?

A Yes. Well, I was present at negotiations with Mr. Berger.

Q Page 8, Paragraph 11 of your affidavit states that all settlement negotiations were conducted by Mr. Berger.

The last sentence of Paragraph 11, page 8.

A Right.

Q Do I understand your testimony to mean that while he was the prime negotiator you were present at times?

A I was present at times, Mr. Newberg was present at times. I don't believe there was any occasion when both Mr. Newberg and I were present with Mr. Berger. There was one settlement meeting after the figure of $10 million was arrived at, but before the form of the agreement was covered where Mr. Newberg went to New York and met with the defendants by himself.

Q Other than these meetings at which Mr. Berger was present, what other activities did you undertake which you have characterized as settlement negotiations, or negotiations, in your affidavit?

A Other than the actual attendance at the meetings?

Q With defense counsel, yes.

A At the meetings?

Q Right.

A Well, there was preparation for those; there was work to be done after the meetings to either revise our strategy to see where we are going from there; there were numerous telephone calls with the defendants relating to the form of the agreement, relating to the terms of the agreement, relating to how the settlement would be presented to the Court.

You know, it's very difficult to include every

thing. All the things that are incidental to a settlement negotiation. They are not necessarily all that tangible and they are not all that easy to pigeonhole.

Q The time involved in correspondence and telephone calls relating to settlement would not fall under category J or general matters in your affidavit? I am looking at Exhibit H, page 3, but it would fall under settlement negotiations.

A Not necessarily, Mr. King. Let me explain category J to you and then maybe that is the best way to handle this.

If a time sheet indicated that there was correspondence and it was incident to the settlement negotiations or it was incident to trying to negotiate the terms of the settlement agreement, ~~that~~ then they may have been included in negotiations. But if it just said correspondence, I put that in a general category.

Also, whenever there was a -- when the time sheet did not explicitly describe what the activity was and there was no way for me to be sure what that -- how that time was spent or on what project, I would put that in ~~in~~ category J, or general. Specifically, I just noted last night that I had some time for myself in November of 1970 where there was no description of the work done,

and I noted, looking through some notes, that I had put that in category J, general, when in fact I know that was time I spent on the class action brief.

So that the period, the time that was assigned to the category general did include correspondence and telephone, but it also included conferences with other plaintiffs or within ourselves, within our own staff which related to the merits of the case or strategy of the case, and also time which I just couldn't positively put to a particular subject matter, although I felt pretty strongly in my mind that it did belong to a particular subject matter, had to be included in general.

Q But generally, the time in category J, general, would have been as described: correspondence, phone calls, interoffice memos or meetings -- of that nature?

A I would say the bulk of the time in that category would be conferences with other plaintiffs' counsel within the Berger firm and time not otherwise specifically allocated. I don't suspect that that much of the -- some of it did. Some of it related to general preparation and correspondence and telephone, but I would say that wouldn't constitute more than a third of it.

Q Under category D, settlement negotiations --

THE COURT: Wait a minute. What exhibit are

you referring to?

MR. KING: Excuse me, your Honor. Exhibit H, page 2 at the end of Mr. Montague's affidavit. And I am looking at (D).

A Under number 1?

Q Well, it is under number 2. It is Exhibit 4, page 2. The second entry is (D). Settlement negotiations. And you have put down 51-1/2 hours for Mr. Berger.

A That's correct.

Q And by my rough calculation it shows 193 hours in addition for yourself and Mr. Newberg. Can you explain to me how you and Mr. Newberg spent roughly four times as much time as Mr. Berger in settlement negotiations if he was primarily involved for negotiating this settlement?

A Yes, I think I can.

First of all, in every meeting that Mr. Berger attended, either Mr. Newberg or I attended. So that would account for approximately the same 51.5. And also for any preparation which we did with Mr. Berger, that would be the same.

What probably isn't included in Mr. Berger's time is the time which he himself spent thinking and contemplating how he was going to go about negotiating,

because there ~~was~~ were no time sheets for that at that time, and that was sort of an intangible thing and was hard to reconstruct, and we have been very conservative and we didn't reconstruct it.

THE COURT: No, I don't think he is talking about that. You have here Mr. Berger, 51 hours and Mr. Newberg 154 hours. You are talking about negotiations. I assume that is sitting down and talking with the other side and conferring with the other side.

Mr. Berger is the one who has done all this. How does Mr. Newberg run up 154 hours?

THE WITNESS: Your Honor, part of that time in the description of D, settlement negotiations includes preparation. And that included our research and the work that we did in determining what we should settle for, what the guide lines were, what the outer limits of claims were, and so forth. And our strategies of how we could substantiate to the defendants the position we were taking

A lot of that ground work was done by Mr. Newberg and I believe that is why it was included to that extent.

I really think Mr. Newberg can better answer the time he spent in those negotiations. I took those hours from the sheets which he constructed of his time

period during that period of time. But that is my understanding of how he got those hours.

Q Were you present at most of the settlement negotiations Mr. Berger had with the defendants?

A I believe I was present at two or three.

Q Approximately how long did those meetings last?

A I'd really have to look at the entries. I'm not sure. They were certainly more than an hour or so. Some of them were quite lengthy.

Q When you reconstructed your time for these settlement negotiations --

A I didn't reconstruct my time for the settlement negotiations, Mr. King, I don't believe.

Q When you logged in your time for settlement negotiations did you include travel time to and from Philadelphia?

A Yes.

Q If you --

A We happened to be on a train, but we were working both going and coming, in what happened, in preparation for the settlement and what happened on the way home.

Q Mr. Montague, you are familiar with the task of settlement administration undertaken by petitioner's firm in this case?

A Yes, I am.

Q And your affidavit states that 1349.6 hours, or 1350 hours were expended in settlement negotiations by attorneys?

THE COURT: No, settlement administration.

Q Settlement administration, rather, by attorneys?

A That is correct.

Q According to Paragraph 10-F of your affidavit, you state that it involved the function of the attorneys making -- the decision making function or functions requiring the exercise of legal judgment.

Would you explain what legal judgments were involved? What types of legal judgments? I don't mean specific examples.

A We had 14,000 claims, over 14,000 claims filed. Each one of those claims was reviewed. Attorneys, including myself, reviewed personally a substantial number of those in order to find out -- in order to get an understanding of what was involved, what the problems were, where information appeared to be scanty or improper, where information appeared to be proper; what the areas of challenging the claims might be, and so forth.

After that was done, after the attorneys got a good grasp of that, then paralegals could work under their

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instructions and under their direction. But before the attorneys actually got a grasp of what was really taking place in the claims and how they were — how they appeared and what the problems were, you couldn't possibly assign a task to a paralegal.

After all the claims were challenged, were reviewed, there were some claims which were questionable, there were other claims that were actually challenged, and in those instances they were reviewed by attorneys. Then -- that is part of the administration. Then there comes the whole gamut of administration and getting the claims set up in final order, presenting them to a Special Master, and so forth. And that took a substantial amount of time, and I might say it paid off because when we had our hearing before the Special Master I think we were able to conclude it in less than a morning. We were able to settle most of our challenges, we were able to negotiate and explain to people why their claims were challenged and they accepted it. All that was done by attorneys, not paralegals.

Q Did this include the telephone calls and correspondence and --

A Certainly did.

Q And matters of that nature?

A It certainly did. Where correspondence --

we had about, I don't know how many forms, but we had many forms of correspondence that were already pretyped, because many of the questions that were asked or the problems were redundant, they occurred over and over again. So that for many of those problems it was relatively routine. We could just say to a paralegal, prepare letter X or letter 3 for so-and-so and it would be prepared for my signature.

In other cases there were questions which actually required a fairly lengthy response in writing. I spent I don't know how many total days on the telephone going over challenges with particularly the bigger corporations, explaining why it was challenged, the basis for it, and giving them every opportunity in the world to come back and tell us where we were wrong. And then they would have to explain it to me. That was a fairly lengthy procedure but I think it paid off because when we got to the bottom line it had to be presented to the Master for approval, everything was in good order and it took a very short period of time.

Q Were these matters which you described as in the nature of routine, routine not only to this case but to other class actions in which you have been involved in settlement administration?

A No, I don't consider settlement administration routine at all in the level that attorneys administer. We are responsible for distributing over $12 million, Mr. King, to over 13,000 claimants, and if you think that is routine, then you have obviously never experienced it. It would be something that I would be remiss on, Mr. Berger would be remiss on, I believe any attorney would be remiss on if he pushed that task off as routine and let paralegals or associate attorneys do it unsupervised.

Q Were you primarily involved in the responsibility of supervising settlement administration in petitioner's firm?

A For this case, yes.

Q Can you explain to me how Mr. Berger expended more time on settlement administration than on settling the case with the defendant, that is, on settlement negotiations?

A Sure. Mr. Berger was also involved in it on a policy level. He attended, I don't know how many of the class action committee meetings. The time sheets would show that. Whenever there were any major decisions in policy I would also discuss them with him and we would arrive together at our position.

I think -- you know, I can't go through it in

detail, but it is very simple. He was also in charge of administering the investment, so to speak, of the settlement fund, and so forth, and his hours were put in in that way. He participated in the hearing before the Master --

Q Is that under settlement procedures, rather than settlement administration, the way you characterize it?

A I think the investment of the fund and the distribution was under settlement administration, I believe.

Q You testified that you did reconstruct for us certain time in this case and you reconstructed with Mr. Berger certain time for Mr. Berger; was that your testimony?

A Well, I'd rather put it rather than a general statement like that, Mr. King, I reconstructed 65 hours for myself, as set forth in 14-B of my affidavit, Exhibit 1, which has been marked as Exhibit 1.

Mr. Berger and I reconstructed approximately 96 hours for him in the manner set forth in Paragraph 13 of my affidavit. And then in addition there is time set forth for Mr. Berger prior to April of 1972 which was taken and that is set forth in Exhibit 8 of my affidavit, and that was taken expressly from other attorneys' time sheets

which indicate expressly that Mr. Berger was present or participated or involved in the activity on that time sheet; it was taken from notes of meetings that were attended by Mr. Berger; and it was taken from transcripts and travel vouchers which showed that Mr. Berger traveled to one place or another.

I don't consider that time being reconstructed but it really is ~~evident~~ evidenced from the actual documents which show that he particpated or attended or traveled or so forth.

Q When you had the time sheets and notes that another attorney had attended a meeting of X hours and it shows that Mr. Berger attended that meeting, did you attribute to Mr. Berger the same number of hours claimed by the attorney who maintained the time record?

A I can't say yes on an overall basis. I may have. I probably asked Mr. Berger if he was there for the whole time or not. If you have a particular instance, maybe I can help you.

Q You don't know what you did as a general natter?

A No. I did not do anything as a general matter. The only thing I did as a general matter was be extremely conservative.

Q Were you involved in the statute of limitations pleadings and briefs in this case?

A Yes.

Q What role did you play in the statute of limitations issue?

A "You" means me personally?

Q Yes.

A I drafted the first brief in the District Court on the issue of the -- when the judgment became final, particularly with respect to the distinguishing of the cases for which the defendant was relying on. I believe I was the original author on the distinction between 5-A and 5-B and why the cases which the defendants were relying upon were inapplicable.

Q Did you --

A That's at the District Court level. Also Mr. Newberg and I believe myself also, I attended several drafting sessions of the final -- in fact I know I attended several drafting sessions with other plaintiffs' counsel to get the final brief which was actually submitted to the Court, and I received nothing but hostility concerning our argument with the inapplicability of the earlier cases cited by defendants on the basis of the independence of the application of 5-A and 5-B of the Clayton Act.

Q In your office who was primarily responsible for the statute of limitations pleadings and briefs?

A Who was?

Q Yes.

A Mr. Berger, Mr. Newberg and myself.

Q But of the three of you did one play a primary role, to the best of your recollection?

A One may have put in more time than the other, but no, no one person played a more primary role.

MR. KING: I have no further questions.

MR. SPIVACK: No questions, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. KING: Mr. Newberg.

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H E R B E R T B. N E W B E R G, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPIVACK:

Q Mr. Newberg, would you state your address and present position for the record?

A My offices are now at 1710 Spruce Street, Philadelphia, and I am a partner with my own law firm. I have one full-time associate.

Do you wish my home address as well?

Q Yes.

A 1317 Lombard Street, Philadelph ia.

Q Prior to April, 1972 what was your position, Mr. Newberg?

A I was then a partner with David Berger PA.

Q Did you on October 9, 1975 execute an affidavit which was filed with the Court in connection with the petition for attorneys' fees in this matter?

A Yes, I did.

MR. SPIVACK: Your Honor, the originals are o file with the Clerk.

May I have a copy marked in evidence?

THE COURT: I have the original. You can

mark that.

MR. SPIVACK: Does your Honor want an extra set? We have plenty of them.

THE COURT: That's all right. Here it is.

(Plaintiff's Exhibit 2 was marked for identification.)

Q Mr. Newberg, I hand you a document which has been marked Plaintiff's Exhibit 2 for identification and ask you if you can identify that document for the record?

A Yes. This is my affidavit which I executed relating to the time I spent in Grinnell litigation.

Q Are the statements in that affidavit true?

A Yes, they are.

MR. SPIVACK: No further questions, your Honor. I offer Exhibit 2 into evidence.

THE COURT: Admitted.

(Plaintiff's Exhibit 2 was received in evidence.)

CROSS EXAMINATION

BY MR. KING:

Q Mr. Newberg, when did you reconstruct the time in the affidavit in Exhibit 2?

A Probably in March or April of 1972, before I severed relations with David Berger PA.

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Q Who asked you to prepare the time reconstructions in Exhibit 2?

A This was part of my litigation duties and specifically I have no immediate recollection. Probably Mr. Berger.

Q Did you reconstruct the time for all the cases on which you had been engaged prior to leaving Mr. Berger's office?

A For most of them that ~~was~~ were still pending or unresolved, probably yes. I can't remember at this date whether there may have been some others or minor ones for which I did not reconstruct time.

Q Did you reconstruct time for the Lindy Brothers plumbing case?

A Yes.

Q Do you recall being deposed in that case in April of '74?

A Yes, I do.

Q Do you recall testifying at page 51 that reconstruction is an inexact science?

A Probably. I will stipulate that --

THE COURT: You are not being asked to stipulate. You are being asked questions. Just answer them.

A I think I probably said that. My recollection at that date is necessarily ~~favored~~ vague as to specifics on page references or particular language.

Q Did you reconstruct the time in this case in the same manner as you reconstructed the time for the Lindy Brothers case?

A Yes.

Q How did you go about reconstructing the time for this case?

A I set aside a considerable period of time, I believe at least a full day or perhaps it spilled over into a second day, where I did nothing else; I shut off all my telephone calls, I surrounded myself with all the pleadings and motions and collections of papers in this case, all the correspondence files, my daily calendar and any other miscellaneous notes that I had. And then, arranging them in chronological sequence as best as possible, and looking at a particular pleading or motion or brief or meeting or whatever the event was involved, I then reconstructed on a conservative basis how much time I necessarily would have spent in connection with the particular events. And this I did for the entire period of time for which daily time records were not maintained.

I was able to do this over -- during this period

of time because I had had many years of prior experience of keeping daily time records in antitrust suits of complex nature and the like. I was very familiar with the time it would have taken to perform and participate in the various items.

When we severed, I guess in late 1970 I, Mr. Berger and Mr. Montague severed relations with a former partnership to form our own firm, when we moved in to the new situation Mr. Berger had an extremely heavy schedule and travel schedule and court appearances and the like, and I sort of became the senior resident attorney for administering all of the various things in our office in all the cases and advising our younger lawyers and paralegals, and so forth.

That is why during that immediate period for a year, a year and some months, I just did not get around to keeping daily time records.

Q I understood your testimony that you used a similar reconstruction technique for the plumbing case as well as for the Grinnell case?

A Yes. And if I may just generalize, I used a similar technique trying to be extremely careful in the reconstruction of the hours based upon prior experience in these matters over a host of many, many prior antitrust

suits that I was involved in.

Q Mr. Newberg, do you have a copy of the Exhibit No. 2 before you?

A The affidavit?

Q Yes.

A Yes, I have.

Q I call your attention to the second page of the exhibits, time record summary for the month of December, 1970. It says preparation of plaintiffs' joint brief in support of national class actions, staff conferences, proofreading.

Is it your testimony that in 1972, namely in the spring, you were able to go back and make what you claim is an accurate reconstruction in the time you spent --

THE COURT: Wait. He doesn't claim an accurate reconstruction.

Q You don't claim the reconstruction is accurate?

A No. I claim it's really conservative.

THE COURT: I don't see how anybody could make that claim. By its very nature it can't be accurate.

Q But you claim it is an estimate?

THE COURT: A pretty good ball park estimate, after reviewing the documents in his possession. But I don't think anybody here will take the position it is

accurate, in the sense of being exact.

Q Do you recall ~~accurately~~ actually proofreading the plaintiff's joint brief in support of national class actions?

A I have a fairly good recollection of not only proofreading it, but annotating it with my comments, discussing it and helping to finalize the final brief. And I have a vivid recollection of my own handwriting on the actual brief, on virtually every page, on various copies that I had in the formulation of the brief.

Q Are you familiar with the original fee petition filed by petitioner Berger in thi case?

A Not specifically. In a general way, yes. I haven't seen that for some period of time. I think I did see it before I severed in 1972.

Q Do you recall whether the time claims were segregated or designated by different categories of activities in petitioner's original fee petition?

MR. SPIVACK: Your Honor, I think that is unfair. He hasn't seen it for three years.

THE COURT: He can just say so.

A I have no specific recollection.

Q Mr. Newberg, in the Lindy Brothers case, when I took your deposition I asked you these questions and you

gave these answers -- and I have two questions and answers, your Honor, on page 35, line 7:

"Do you know whether there are records in existence describing what was done by you during this period you reconstructed your time, or did you simply reconstruct the number of hours without making a notation of the type of matter undertaking?

"A I reconstructed time on the daily basis without making specific notation as to particular work performed on the particular day of reconstructed hours."

Then, on the next page, page 36, line 22, I asked you the question:

"Let me interrupt to see if I understand what you are testifying to. Did you not say earlier that you only reconstructed the hours?

"A That's correct.

"Q -- Well, I will end there.

The question was "And not what was done on each day."

MR. SPIVACK: Are you going to stop there?

MR. KING: Yes, Counsel, I am.

MR. SPIVACK: Your Honor, I have to show the witness the transcript. He is stopping in the middle of

the sentence.

THE COURT: Read the whole sentence.

Q "A Let me try to clarify that.

"Q Okay.

"A I did reconstruct what was done on each day and in the process of reconstruction I recorded for purposes of being able to add up the number of hours.

"Q The numbers only?

"A The numbers only."

Is that --

MR. SPIVACK: Let's go two more.

Q "Q All right.

"A But I did reconstruct what happened on each day for this period of time."

MR. SPIVACK: Okay.

Q But the fact of the matter is, did you not previously testify when you engaged in the reconstruction, that you logged certain hours down only for various activities, but that you did not characterize them by given activity. Or do I misunderstand your prior testimony?

A I think you misunderstand it.

During the reconstruction I had before me

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collections of pleadings and motions for -- well, let me state what I did in reference to Lindy Brothers, which is the same procedure I followed for Grinnell.

In Lindy Brothers I had before me the pleadings with an in-depth pleadings and motions alike, and also the correspondence and travelogues and expense vouchers and all the other papers that were available, demonstrating my participation in the litigation. For the pleadings and motions what I did in particular was to Xerox a copy of the index to all of those pleadings and motions, collection of papers. And then, looking at each and every event in which I know I participated, in a motion in one form or another, ~~and~~ in the margin of the Xerox copy of the index of the motion pleadings and briefs, I wrote in my own handwriting the estimated number of hours conservatively spent on those items.

So for pleadings and briefs and motions and the like, there is able to be categorized at a later date specifically what those hours were attributed to. For non-meetings or non-motions, matters of a more general nature other than litigation events as such, for example, meetings and conferences and correspondence and telephone calls and trips, I was able very specifically to attribute a number of hours to those events which again I did, so

that in every event the hours were not isolated from the specific source material from which I was doing the reconstructing. And in every event I think anyone -- I was able to reconstruct by category the nature of work performed and the number of reconstructed hours I attributed to that.

Q I ask you to turn to the last page of the exhibits attached to the affidavit, Mr. Newberg, and it covers March '72.

A Yes.

Q Will you explain more fully how you reconstructed the 13 hours for correspondence, telephone conversations, claims processing, staff conferences?

Let me withdraw the question.

Did you prepare this sheet, time summary records for the month of March '72?

A The specific sheet was not prepared by me personally. I prepared the data for this sheet.

Q In what form did you prepare that data?

A By reconstructing the number of hours that I spent during the month of March, 1972 and categorizing the types of work performed during that month. That was translated into this format.

Q Do you construct some sort of scratch papers or work sheets?

A I am sure I did.

Q Do you remember specifically?

A Yes. I have a specific recollection that all of the reconstruction was done with scratch sheets and the like, so that we can tally it and ultimately categorize it.

Q You reconstructed more than just the hours; you assigned -- or just the numbers; you assigned numbers to certain activities?

A Most definitely, yes.

Q Do you know whether the scratch sheets or work papers are in existence?

A I haven't seen them since leaving the law firm of Berger in April 1972. I don't know.

Q When you were asked to reconstruct your time for this case were you asked to reconstruct the hours only, or to categorize it by certain activities?

A I was asked to reconstruct them on a full and complete basis and whenever there was any doubt, to have a conservative estimate; and I did follow those instructions quite scrupulously. That would include by kind and category of work performed.

Q Were you given a set of categories into which to fit your time?

A No, I was not.

Q Were you involved in the statute of limitation issue at the District Court level?

A Yes, I was.

Q Do you know Mr. Joel Hoffman?

A Yes.

MR. KING: May I have this marked as our Exhibit 1. It is an affidavit of Joel E. Hoffman, the original of which is on file, and copies have been produced to the Court and to Mr. Spivack.

(Bay Fair Exhibit A was marked for identification.)

Q Mr. Newberg, I direct your attention to Paragraph 4, page 3.

THE COURT: Just a second. Where do I find this?

MR. KING: Your Honor, I forwarded to the Court by letter last week copies of certain affidavits previously filed in 1972 by the attorneys involved. That is, after learning that the troika had withdrawn from the proceeding --

THE COURT: I have it.

Q Is Mr. Hoffman's affidavit correct, Mr. Newberg, that you did prepare an initial draft of the statute of limitations brief?

A It is accurate that I participated with Mr. Montague and Mr. Berger in the preparation of the initial draft of the statute of limitations brief. I believe I may have forwarded the brief with my letter to Mr. Hoffman, and that is how I was named as drafter. But it was a joint effort.

Q Was it true that the other plaintiffs' counsel involved in this issue, such as Mr. Hoffman and the attorneys from Weil Gotschal were unsatisfied with the draft you prepared? Do you recall that? Whether you agree or not, do you recall it?

A I recall that there was a rather extensive discussion evaluating our brief among the other plaintiffs' counsel outside of our office.

When the brief was drafted it was realized by our office that the statute of limitations issue was probably most critical of all to the national class actions, rather than to any general individual actions that had preceded the particular cut off date involved in the statute of limitations question.

Therefore, we thought it was most vital to the interests of the national class that this issue be successfully briefed and argued to benefit the entire class-wide scope of governmental, ~~special,~~ commercial and industrial sub-

scribers of burglar alarm systems.

It is true that we did have disagreement on the content of the brief and it is true that the final brief was redrafted. It is not accurate that the final draft did not include important points that were rasied in the initial draft prepared by Mr. Berger's firm.

Q Is it true as alleged in Paragraph 9 that Mr. Hoffman drafted the final version of the brief as agreed to by the troika, yourself and Mr. Hoffman?

MR. SPIVACK: Paragraph 9?

MR. KING: Paragraph 9, page 4.

MR. SPIVACK: Paragraph 9 deals with the appellat brief --

MR. KING: I am sorry. I am skipping. I stand corrected, Counsel.

Q At the District Court level is it not true that the final brief was not prepared by your firm?

A That is not accurate. The final brief was a joint effort by our firm and the troika and other member subscribers and competitor plaintiffs. It was certainly a joint effort built upon the initial draft prepared by Mr. Berger's firm, built upon a second draft I believe prepared either by Joel Hoffman or someone else, which included points discussed in the initial draft.

Q Is it true as asserted in Paragraph 5, page 3 that the final District Court brief by agreement of a meeting on August 1 would be prepared by Mr. Hoffman?

A I think the final draft was prepared by Mr. Hoffman. I don't have a specific recollection that I was present at such meeting. I may have been. So that the end result is that Mr. Hoffman undertook to do the final version of the draft, building upon earlier drafts.

Q Were you familiar with the appellate version of the brief, with the brief filed in the Appellate Court?

A Yes.

Q Did Mr. Hoffman prepare that on behalf of the plaintiffs involved?

A Again, I believe he was the principal draftsman of that brief, but it would be inaccurate to say that the final brief submitted on appeal was the draft prepared by Mr. Hoffman alone.

Q I understand.

A It was definitely a joint effort, including intensive participation by myself, Mr. Montague, Mr. Berger.

Q Were you primarily the liaison of the Berger office with the other plaintiffs involved in this issue at this particular time, if you recall?

A I think that was a joint effort with Mr. Montague

and me participating as co-liaison with the other plaintiffs' counsel.

Q Do you know whether an agreement was ever reached that it would best serve the interests of all plaintiffs if a single argument was presented in the Court of Appeals on this issue, as alleged in Paragraph 11, page 5?

A I was not aware of that until the day of the argument when Mr. Berger and I attended the argument, and Joel Hoffman approached me and mentioned that the other plaintiff's counsel had selected him to present the argument, and I told him that I was unaware of that agreement.

Mr. Berger had extensively prepared for the argument and at the last minute Mr. Berger and Mr. Hoffman to my knowledge, did communicate briefly and decide on parts of the argument that he would raise.

Q Were you present at the argument?

A Yes, I was.

Q Mr. Hoffman alleges in Paragraph 12, page 6, that following, the last sentence, following his argument Mr. Berger's argument included no points not previously advanced, except for a comment on the "Favor with which the Court should look on treble damage claims by State and

local governmental bodies."

Do you have a recollection that that was the sum and substance of Mr. Berger's comments?

A I have a specific recollection of the argument and Mr. Berger's participation, and this is by far an understatement of the participation of Mr. Berger in that argument. I don't remember the specific arguments made, but I do know that our initial participation in the briefing on the statute of limitations stressed the interdependence of the Clayton Act, Sections 5-A and 5-B in order to distinguish earlier precedent.

I know that Mr. Berger stressed that particular argument which was ultimately a deciding factor in the latter opinion by the Court. Mr. Berger did stress the importance of treble damages by plaintiffs to enforce the antitrust laws and I'm fairly sure, without repeating any of the earlier argument by Joel Hoffman, he reaffirmed some other salient points that were not adequately stressed by Mr. Hoffman.

I think that both Mr. Berger and Mr. Hoffman did a really commendable job, without any kind of counter-productive effort on the part of each. They supplemented each other I think beautifully and in a private conversation with Mr. Hoffman and me after the argument, Mr. Hoffman

agreed with that kind of feeling that I received.

Q You felt that Mr. Hoffman contributed materially, then, to this issue?

A He made a material contribution, certainly, as well as did Mr. Berger.

Q Do you recall how long Mr. Hoffman argued? Was it a 30-minute argument for each side, or longer than that?

A I think each side had approximately 30 minutes and Mr. Hoffman consumed a little more than half, and Mr. Berger a little less than half of the argument time. That is the best of my recollection.

Q Did Mr. Hoffman reply to the defendants' argument, or Mr. Berger?

A As I recall, there were no reply arguments at all.

Q One final question.

You testified in the plumbing case at pages 52 and 53 of your deposition that typically you worked long days or you did while you were at the Berger firm, and that it was not in a sense atypical to have a 16 or 20-hour day. Was that true with respect to the Grinnell case as well as the Lindy Brothers case?

MR. SPIVACK: Objection, your Honor. He said

"It was not inconceivable I would have totaled 16 or 20 hours."

Not that it was not unusual.

Q My question is, did you regularly put in 16, 20-hour days?

A It was not uncommon. It was not regular, but it was not by any means uncommon that during the time period, and I still put in that kind of time commitment to legal services.

Q That applied to this case as well as to the Lindy Brothers case?

A Yes. Well, with the Berger firm we had a full case load of antitrust matters of a major complex nature, and I felt that it was important to devote sufficient time to each of them.

Q Was that true as to other members of Mr. Berger's office, to your knowledge?

A I can't speak specifically for the hours put in. I did observe most of the other members of Mr. Berger's firm there at most unusual and off-hour times when I personally was also present.

Q If I understand your testimony, you are speaking of hours in the office on matters not then in litigation, actually on trial?

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A No, that is not accurate. These are matters in litigation.

Q But not actually in the course of trial?

A Most of them were in the course of pretrial.

MR. KING: Thank you.

I have no further questions.

REDIRECT EXAMINATION

BY MR. SPIVACK:

XX Q In discussing the statute of limitations issue, you said one of the points the Berger firm was making was the interdependence between Section 5-A and B. Do you mean interdependence or independence of Section 5-A and 5-B?

A I thought I had said, and I did mean interdependence.

Q Would you explain that?

A Some of the earlier cases were not clear on whether the Government proceedings were still pending within the meaning of Section 5-B of the Clayton Act for purposes of the statute of limitations, concerning the precise continuation of that trial period of Government related litigation.

Earlier precedent, which was adverse stressed or earlier precedent relied on the separation of prima fac

evidence rule of Section 5-A and the tolling provisions of the statute of limitations in 5-B. It was our interpretation, after a study, that the two sections were interdependent and worked together in terms of if something would be prima facie evidence it would also serve to toll the statute of limitations for the relative provision in the same series of sections.

Therefore, in order to distinguish and make consistent earlier prior precedent it was our position that the two sections should be read together; the language of the statute referring one section to the other'

Q Have you looked at the draft briefs you prepared in connection with this issue in the last three years?

A I have not.

MR. SPIVACK: Your Honor, I think if you look at the briefs, the draft briefs attached to Mr. Berger's prior affidavit in this matter, it is quite clear the witness is confused.

I wonder if we could excuse the witness at this time, let him look at the draft briefs --

THE COURT: We will have a short recess.

(Recess.)

THE COURT: You may proceed.

BY MR. SPIVACK:

Q Mr. Newberg, during the recess did you have an opportunity to refresh your recollection with respect to the statute of limitations issues by reviewing the draft briefs attached to Mr. Berger's affidavit of May, 1972?

A Yes, I have.

Q Was it the Berger position in 1972 that Sections 5-A and 5-B were independent or interdependent?

A They were independent from each other. Since leaving the Berger firm I have had no occasion whatsoever to refer to the particular sections involved, and I was confused. My memory has now been refreshed by reviewing the brief.

As I now recall, Section 5-A of the Clayton Act deals with prima facie effect of decisions, prior governmental proceedings. Section 5-B of the Clayton Act deals with tolling of the statute of limitations.

THE COURT: What is the matter, Mr. King?

MR. KING: I will stipulate to whatever the brie states, your Honor.

THE COURT: I don't need to have him tell me what the law is. I have written on it, haven't I, Mr. Spivack?

MR. SPIVACK: Yes, your Honor. But there ha

been testimony here that there was a conflict --

THE COURT: Mr. King has said he will accept whatever statement you want to make.

MR. KING: Mr. Newberg says he was confused by passage of time. If you want to offer the brief I will not make an issue of it.

MR. SPIVACK: But I want to refresh your Honor's recollection because the point has been made with respect to Mr. Hoffman's position. Our position is the papers have been clear throughout, your Honor, that there was a conflict between Mr. Hoffman and Mr. Berger on this matter because Mr. Hoffman represented competitors. We represented subscribers.

The subscribers wanted to prove damages by showing prices were higher than they should have been.

THE COURT: I know all about this.

MR. SPIVACK: Then they went up on this argument on the statute of limitations that Mr. Hoffman said there was no need to have a subscriber there, but there was need to have that, because the competitors wanted ~~it~~ 5-A not interdependent ~~on 5-A and 5-B, but~~ of 5-B. They were going to come back and rely on the Government decree on 5-A. We weren't. We wanted to stress the independence. There was an important point here and I just wanted to make sure it

was clear.

MR. KING: There are other subscribers such as the troika on whose behalf Mr. Hoffman was authorized to speak on that day.

MR. SPIVACK: We felt we had to speak to represent our clients. They felt they had to have somebody to represent them.

Q Do you have a financial interest in the outcome of this litigation?

A None whatsoever.

MR. SPIVACK: No further questions.

MR. KING: I would like to offer Mr. Hoffman's affidavit. I understand Mr. Spivack has no objection to that.

THE COURT: All right.

(Defendant's Exhibit A was received in evidence.)

xx MR. KING: Based on the characterization of Mr. Newberg's affidavit as not purporting to be accurate and based on the fact that it is only an information and belief affidavit, I'd like to move to strike that affidavit.

THE COURT: Which part of it?

MR. KING: The part relating to the reconstruction of hours which is I believe an information and belief

affidavit which the witness more or less concedes that the matters set forth therein are not matters to whose accuracy he can attest to, on personal evidence; it's not of an evidentiary character.

THE COURT: You cross-examined him on it and brought out the basis for his belief and, therefore, that is the testimony before me. The question of what weight I am going to give to it is another question. But I wont' strike it.

MR. KING: I accept your Hono r's ruling.

MR. SPIVACK: No further questions.

(Witness excused.)

MR. SPIVACK: Mr. Berger, please.

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D A V I D B E R G E R , called as a witness by the plaintiff, being first duly sworn, testified as follows:

THE WITNESS: My office address is 1622 Locust Street, Philadelph, Pa., 19103. My home address is 4101 Timber Lane, Philadelphia, 19140.

DIRECT EXAMINATION

BY MR. SPIVACK:

Q Mr. Berger, did you execute an affidavit on October 30, 1975, which was filed with the Court in connection with this petition for attorneys' fees?

A Yes.

MR. SPIVACK: May I have the affidavit marked Plaintiff's Exhibit 3 for identification.

(Plaintiff's Exhibit 3 was marked for identification.)

Q Mr. Berger, I show you a document which has been marked Plaintiff's Exhibit 3 for identification and ask you if you can identify it for the record?

A Yes. This is my affidavit which I executed in connection with the proceedings.

Q Are the statements in this affidavit true?

A Yes.

MR. SPIVACK: Your Honor, I offer this as

Plaintiff's Exhibit 3.

THE COURT: Any objection?

MR. KING: Yes. It is an affidavit on information and belief, and I don't believe it is of such an evidentiary character as to be admissible.

THE COURT: You may cross-examine on it.

MR. KING: Does your Honor wish me to proceed now?

THE COURT: I assume that is what you are going to offer.

MR. SPIVACK: I am going to offer the other two affidavits, your Honor, and two other documents.

Q Mr. Berger, did you execute an affidavit in this matter on March 20, 1972?

A Yes.

MR. SPIVACK: May I have that affidavit marked Plaintiff's Exhibit 4 for identification.

(Plaintiff's Exhibit 4 was marked for identification.)

xx Q Mr. Berger, I show you a document which has been marked Plaintiff's Exhibit 4 for identification and ask you if you can identify that document?

A Yes. That is the affidavit I executed on the 20th of March, 1972, in connection with these proceed-

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ings.

Q Are the facts stated in that affidavit true as of March, 1972?

A Yes.

MR. SPIVACK: I offer Plaintiff's Exhibit 4, your Honor.

THE COURT: Any objection?

MR. KING: Not to that affidavit, no.

(Plaintiff's Exhibit 4 was received in evidence.)

Q Mr. Berger, did you execute an affidavit in this matter on May 23, 1972?

A Yes.

MR. SPIVACK: Your Honor, may I have this marked Plaintiff's Exhibit 5 for identification.

(Plaintiff's Exhibit 5 was marked for identification.)

MR. KING: Counsel, may I review that briefly?

THE COURT: Wait. He hasn't.

MR. SPIVACK: Do you want me to identify it for the record?

MR. KING: Yes.

Q Mr. Berger, would you identify Plaintiff's Exhibit 5 for identification for the record?

A It is my affidavit in opposition to the application by Parker, Chapin, Flattau, et al for attorneys' fees in connection with these proceedings.

Q Executed on --

A May 23, 1972.

MR. SPIVACK: I offer it in evidence, your Honor.

THE COURT: There is an objection, I gather, Mr. King.

MR. KING: Just one moment, your Honor.

(Pause.)

MR. KING: I do not object, your Honor.

(Plaintiff's Exhibit 5 was received in evidence.)

MR. KING: I think it is a matter of argument and weight.

MR. SPIVACK:

~~Q~~ A Mr. Berger, at some time did Joel Hoffman and the law firm of Wald, Harkrader & ~~Rose~~ Ross make a claim on any fees to be awarded to you in this matter based on services they performed which allegedly benefited the class?

A Yes.

Q Have you settled Mr. Hoffman's claim?

A Yes.

MR. SPIVACK: Your Honor, may I have this marked

Plaintiff's Exhibit 6

THE COURT: I have a letter from them that says so. Mr. Sugarman from Weil, Gotschal & Manges.

MR. SPIVACK: That is the troika, your Honor.

THE COURT: Sorry.

(Plaintiff's Exhibit 6 was marked for identification.)

Q Mr. Berger, can you identify the document which has been marked Plaintiff's Exhibit 6 for identification?

A Yes. That is the letter sent by Wald, Harkrader & ~~Rose~~ Ross executed by Joel E. Hoffman, a member of the ~~first~~ firm, to my counsel, namely Lord, Day & Lord by yourself in which the settlement is expessed.

MR. SPIVACK: Your Honor, I offer that as Plaintiff's Exhibit 6.

MR. KING: No objection, your Honor.

(Plaintiff's Exhibit 6 was received in evidence.)

Q Mr. Berger, at one time did the firms of Weil, Gotschal & Manges, Liebman, Eulau, Robinson & Perlman, and Parker, Chapin & Flattau make claims against any fees that might be awarded you in this matter based on services they performed which allegedly benefited the class?

A Yes.

Q Have you settled the claim of the troika in this matter?

A Yes. Those three firms were commonly referred to as the troika.

MR. SPIVACK: May I have this marked Plaintiff's Exhibit 7 for identification.

(Plaintiff's Exhibit 7 was marked for identification.)

Q Mr. Berger, would you identify for the record the document which has been marked Plaintiff's Exhibit 7 for identification?

A This is a letter which my counsel, Lord, Day & Lord, sent under date of October 21, 1975 to the three law firms you mentioned, who are commonly called in these proceedings the troika, setting forth the settlement with those firms.

MR. SPIVACK: I offer that as Exhibit 7, your Honor.

THE COURT: Any objection?

MR. KING: No, your Honor.

(Plaintiff's Exhibit 7 was received in evidence.)

MR. SPIVACK: No further questions.

CROSS EXAMINATION

BY MR. KING:

Q Mr. Berger, Exhibit 6, which I have seen for the first time this morning, in evidence represents, memorializes an agreement by which in your behalf $20,000 was paid to Mr. Hoffman.

Why was that $20,000 paid to Mr. Hoffman?

A It has not been paid.

Q Or will be paid, or there is an agreement to pay. I haven't had a chance to study the document completely, but it's in effect an agreement to pay, is it not?

A Yes.

Q Why did you permit such an agreement to be entered into in your behalf?

A Mr. Hoffman had been making demands for at least 10 per cent of whatever award would be ultimately awarded to my firm. These demands were referred to my counsel, Lord, Day & Lord. My counsel recommended a resolution of that part of this seemingly interminable litigation in the way expressed in that exhibit which you now hold in your hand; which I think you said was Plaintiff's Exhibit 6.

Q Yes, Mr. Berger.

Did you consider, in the light of the Court's prior decision in this matter and in light of the disposition of the Court of Appeals in ruling on this matter, did you consider Mr. Hoffman's claims to have some validity?

THE COURT: Wait. I never expressed any view as to Mr. Hoffman's claim, nor did the Court of Appeals. They expressly reserved, is my recollection.

MR. SPIVACK: Your Honor, it goes beyond that. The Court of Appeals' decision wasn't until a year after the agreement.

THE COURT: But didn't they say they voiced no opinion on it?

MR. SPIVACK: Absolutely, your Honor. I don't know how he can ask that.

Q Judge Metzner did, if I can characterize the Court's decision, postpone a resolution on the application of Mr. Hoffman and the troika, did it not?

A I think that is a characterization that you have made, and I think that others may make different characterizations. I know that there was no decision of the claim. I also know that their claim was disputed.

THE COURT: I know what I did, so let's go on to the next question.

Q There was a statement in the prior decision that

a hearing would be held on this matter because the affidavits of yourself, admitted in evidence, and the troika were on a collision course; do you recall that?

MR. SPIVACK: Your Honor, the opinion speaks for itself.

THE COURT: Let's go on to something else.

Q Why did you agree to --

THE COURT: Because he wanted to settle a disputed claim.

Q Did you consider the claim to have any validity?

A I challenged the validity of the claim. It was disputed. The matter was then referred by my firm to our counsel, Lord, Day & Lord, and they advised me to accept that proffered settlement, which is substantially below what Mr. Hoffman was claiming.

Q Is that true with respect to the settlement proposal with the troika?

A It certainly is. Everything I have just said with respect to Mr. Hoffman's disputed claim applies with equal force to the troika's disputed claim.

Q Do you dispute the fact that Mr. Hoffman and counsel for the troika materially benefited the class actions or your prosecution of those class actions?

A I personally believe that we, my firm, and my

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firm alone conducted the litigation on behalf of the class. To the extent to which it could be argued reasonably that some of the services performed by Mr. Hoffman or the troika made a substantial or a material contribution, then there is that dispute. And I referred that to my counsel, Lord, Day & Lord. They recommended this to be the appropriate method for resolving that dispute.

Q I'm afraid that wasn't my question. Lord, Day & Lord did not represent you at the time the cases were settled, or at the time the cases were in litigation; they represented you only on this fee matter.

THE COURT: At the same time that the troika came in with their motions, as I recall it.

MR. KING: But my question was going back further in history.

THE COURT: I don't see any point of pursuing this line. There is a dispute, I haven't resolved it. I may have said that the troika was entitled to 50 per cent or that Mr. Berger in his allocation of hours would have to be drastically reduced because he ~~as~~ is taking credit for what the troika said they did. That was their position in their papers, at least. We never resolved that. But there is a serious dispute as to whether Mr. Berger is entitled to the entire fee he asked for or whether he owed

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out of that fee something to the troika. I thought it wa quite a novel question. At least at that point two years ago this had never been raised in the courts. So we put it aside. Now Mr. Berger is faced with a claim against whatever fee he gets.

He realizes after consulting with his counsel who now exist and existed as of the date of the hearing on the application for the fees, that there is a serious question involved and, as all lawyers, they agree what is the insurance policy I take out by way of settlement against the possible exposure if the Judge holds beyond what we ar willing to pay. And that is the way you settle everything, isn't it?

THE WITNESS: Your Honor, that is --

THE COURT: Wait.

MR. KING: Your Honor, my point is that the question remains whether the factual assertions made in Mr. Berger's behalf that he worked wonders for the class are supportable or whether or not he was part of a large group of attorneys litigating in this case.

THE COURT: But if he is ~~payable~~ paying out of his fe to the other people, then they jointly worked for the clas and this fee encompasses their work as well as his work. That is what I gather the settlement means.

MR. KING: And I gather it diminishes his claim in behalf --

THE COURT: No, it dcesn't. Of course not. Not one cent. Because he is paying out of that what he thinks is their contribution.

MR. KING: I don't mean it diminished it in dollars, but it would diminish it as far as the claims to the value of his legal services to the Court.

THE COURT: Now, because if he says on the work on the statute of limitations questions, which is awfully important for his point of view, not the other 85 cases that had been, he really went to work on it and saved it. He says if he didn't do that, you'd have no hearing, and, "I did it," he says.

The troika says no, you didn't, we did it. But whatever it was, it came out as a single package, and this fee will ~~recover~~ cover that.

He is paying here, he is taking care of the troika on the side out of it.

MR. KING: I agree, your Honor.

THE COURT: I am not going to knock him down because the troika is getting some money. I may knock him down for other reasons, but not for that.

MR. KING: It wasn't from a dollar point of view

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your Honor. I think it goes to the claim that he worked wonders on the ~~class's~~ classes' behalf.

THE COURT: Well, that is the only way you get it, is interpret it into dollars. That is why he wants his fee, because he claims he worked wonders for the ~~class.~~ classes.

MR. KING: And I think the fact that he paid the toika something diminishes that claim.

THE COURT: No, it doesn't. It can't diminish the claim, because the troika says my claim is now with you, Mr. Berger. You get credit for it all because you are taking care of my contribution. He is going to get in this fee what the troika contributed.

MR. KING: I'd say that would be contrary to the law of the Second Circuit, your Honor, because only the hours of the troika or Mr. Hoffman on the statute on the statute of limitations issue, for example, are not part of this record, so --

THE COURT: What?

MR. KING: The basic determination in awarding a fee to Mr. Berger or to anyone in this case must be the hours expended on certain given levels of activity or designated activities.

THE COURT: That's right.

MR. KING: I don't see how Mr. Berger can now -- how it can be transferred to Mr. Berger any activity undertaken by the troika.

THE COURT: He is saying, I have done whatever the total hours are, my firm did this and we are responsible for the results. The toika said no, you are not, we were responsible for the results or part of it, and therefore we want a piece of your fee because you took advantage of our contribution, the old Maine case. That was the issue that was presented in those motions.

But he bought his peace there. Nothing wrong with that. He is not saying I did any less work. He is not saying I'm not responsible for the statute, because it was pointed out here, his case had the statute problem, tho others didn't have the statute problem. They were home free.

MR. KING: My simple point, I don't mean to prolong it, is that by reaching an agreement with the troika and making peace with them, he cannot take credit for their legal services to their clients.

THE COURT: You blind yourself by saying -- I am not cutting him down, because if I were to cut him down by the amount he paid the troika, he paid the troika twice.

MR. KING: I didn't mean to imply that.

Q Mr. Berger, when did you first learn of the Government proceeding in this case against the defendant, approximately?

A Approximately in 19 -- somewhere in the '60's. When you say when did I learn, I must have read about it, I don't know precisely when. It was some time during the period of 1960, that date.

Q When did you first decide to file a private treble damage action against the defendants in this case?

A Some time from the period from 1967 to 1968. It was under very active consideration by my firm then.

Q Do you recall when you did file?

A Some time in July of 1968, I believe.

Q You filed three actions?

A Yes.

Q Were they not filed approximately one year to the day subsequent to the Government's decree?

A Well, the records will show. They were filed on a date which I think almost coincided but did not quite coincide with the expiration of one year from the date of Judge Wyzanski's decree on remand.

Q Why did you not file your actions earlier?

A There were a lot of questions that came up.

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One of the most serious ones was whether or not a class action, or class actions should be undertaken in this case. That was a very, very risky thing.

Q If you had filed your suit or suits substantially earlier, why would you have been confronted with the statute of limitations issue, or was that not of your own creation by your deleteriousness?

A No, it was not an issue of my own creation by my deleteriousness, because the defendants took the position ultimately that the statute of limitations, the one-year period for tolling the statute of limitations began with the date of the decision of the U. S. Supreme Court, which was, I believe, 1966.

The decision on filing the lawsuit was one which I made ultimately based upon all of the factors, including the question of the clients of our firm. There was a very, very serious question of class action at that time.

We had had not long before that an adverse decision by Judge Kraft in the Library Books case in the Eastern District of Pennsylvania, in which he had rejected what we thought was a perfectly good class action. That decision by Judge Kraft, among other things, made us pause very, very seriously and we realized that we were under-

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taking, if we were going to file a class action, we were going to undertake a real risk.

We never really made that decision until the time we filed the case.

Q Did you consider filing suits other than class actions on behalf of your named clients?

A Yes. That's what most of the lawyers who had filed actions before us had done, including I believe your own firm. You filed one for R. H. Macy.

Q Did we file one prior to your action?

A I'm not sure.

Q About how many were filed?

THE COURT: I think his was the last action filed that was any good.

MR. KING: No, your Honor.

MR. SPIVACK: For example, your Honor, the three State class actions were filed three months after Mr. Berger's.

THE COURT: That's right. Sorry.

MR. KING: I would like to mark this as Exhibit B, and I understand Mr. Spivack has no objection.

Group Exhibit B. It contains the affidavit of the troika.

Mr. Berger has a counter-affidavit already in

evidence, and I have sent one to Mr. Spivack and to your Honor last week.

THE COURT: I have it.

(Defendant's Exhibit B was received in evidence.)

Q Mr. Berger, I direct your attention --

MR. SPIVACK: Mr. King, may I ask you a question? Does your exhibit include the affidavit that was subsequently filed by Mr. Victor, correcting a statement in the prior affidavit?

MR. KING: I cannot answer that, but I do not ~~beliefe~~ believe I will examine M. Berger on anything that any subsequent affidavit relates to. If there is a subsequent affidavit, I have no objection to it coming in.

THE COURR: The Victor affidavit was executed May 8, 1972.

MR. SPIVACK: May 24, 1972 Mr. Victor filed a subsequent affidavit which is in the files where he ~~connects~~ corrects the one factual conflict between the troika and Mr. Berger. Remember, at one time they said they were surprised when Mr. Berger showed up at the Court of Appeals, and we filed an affidavit showing they were put on notice for more than two weeks, and Mr. Victor apologized

THE COURT: I remember that.

MR. KING: I have no objection to that coming in. I will not examine on the basis of Mr. Victor's prior affidavit with respect to that.

THE COURT: Go ahead.

BY MR. KING:

Q I direct your attention to the Robinson affidavit, the second affidavit part of this exhibit. It i a group exhibit. All the troika affidavits are appended together the way they were previously submitted to the Court, as I understand it.

I direct your attention to the top of page 6 of the affidavit of Herbert Robinson. Mr. Robinson suggests that it was by happenstance that at his law school alumni reunion he met Mr. Newberg, who requested a copy of his complaint, in effect.

Do you recall that incident, or were you aware of that at the time?

A I don't have any present recollection of that at all. I know that it is not uncommon for lawyers --

THE COURT: Wait. You are not being asked that.

Next question.

Q Was that the origin of your becoming involved in the Grinnell litigation?

A Not to my knowledge.

Q Was Mr. Newberg in your office the person who suggested your entering into this litigation?

A No.

Q Who suggested it?

A I did.

Q I direct your attention to Paragraph 11, page 13 of the Robinson affidavit, the top of page 13. It states that for all practical purposes your complaints were Xerox copies of complaints forwarded to you.

Do you take exception to that?

A Yes.

Q In what respect?

A In this respect:

That the complaint which we filed contains a substantial amount of material which may have been in the Robinson complaint or the Port of New York Authority complaint. That material may have been in some other complaint, for all I know. There was no class action whatsoever at the time when we filed our complaint.

The importance of our complaint was the class parts of the complaint. They were absolutely essential. I think if you compare the complaints you could find out, it may very well be that the Robinson complaint had material

in it which was the same as or similar to the material that was contained in some of the other complaints that were filed by some of the other firms in this litigation. But they were subscriber complaints.

Moreover, Mr. Fensterstock was an assistant to Mr. Goldstein, Sidney Goldstein, who was then the head of the Port of New York legal department, was a good friend of mine, and indeed he represented --

THE COURT: Look, Mr. Berger. Let's strike all that. You were asked a simple question. Let's get a simple answer.

The question is, is your complaint, if you take it page for page, a Xerox copy except for the first two pages and last two pages of the Port Authority complaint?

THE WITNESS: I would say the materials if you compared them are probably so.

THE COURT: He makes a specific claim, Xerox. He says word for word, page for page.

Is it or isn't it?

THE WITNESS: I don't really know. I have never checked --

MR. KING: Your Honor, some pages were short pages, as if some allegations were deleted.

THE COURT: You used the word Xerox. He says

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he doesn't know. I can look at the record and find out.

MR. SPIVACK: Your Honor, may I comment on this?

THE COURT: No, you have a chance for redirect.

Q Do you take the position that Mr. Robinson did not assist you in this case?

A I don't know how you define the word "assist".

Q Did you benefit from the services rendered to the clients of the troika by counsel representing the troika?

THE COURT: I think he's given that answer. He says no.

MR. KING: I would ask the Clerk to hand to Mr. Berger his March 28, '74 affidavit. I believe it is number 4.

(Pause)

Q I direct your attention to page 3, the end of Paragraph 6. The first new sentence begins:

"Accordingly, petitioner became an active member of the steering committee and drafted the motion for production of documents which became the singular most important and significant discovery tool in these cases."

Did you personally participate in drafting

that motion for production of documents?

A Mr. Newberg and Mr. Montague did the original work and I personally participated in reviewing the work that they did.

Q Do you know what date that motion for production of documents was prepared?

A No.

Q I direct your attention to the Robinson affidavit, Paragraph 6, page 5, where near the bottom of the page -- the page is not numbered by line, but is a new sentence beginning:

"In point of fact, the laboring oar in connection with the preparation of the ~~Rule~~ Rule 34" --

A Excuse me, what page is this?

Q Page 5, Paragraph 6.

A I have it.

Q I will summarize; that Mr. Robinson claims that the laboring oar was taken by his firm on that motion and it continues to read:

"Significantly, we had prepared the Rule 34 application very promptly and forwarded our applications to Mr. Berger's firm on July 24, '68, before the class actions were transferred to New York."

And he refers to Exhibit A.

Let me just state for the record, before I ask you the question, before the class actions were transferred to New York you could not have been, as I understand it, a member of the steering committee. Is that statement, to the best of your knowledge, correct in the Robinson affidavit, because it seems to be at odds with your statement in your own affidavit?

MR. SPIVACK: Which statement, your Honor? He has made two statements.

THE COURT: MR. King?

MR. KING: The Robinson affidavit stated that prior to the class actions being transferred to New York his firm had prepared the Rule 34 applications and forwarded copies to Mr. Berger's firm. The Berger affidavit which places great reliance on the importance of the Rule 34 motion stated that he drafted the Rule 34 motion.

MR. SPIVACK: Your Honor, Mr. Robinson's affidavit is talking about a Rule 34 application that was filed by his firm in a single subscriber case. Mr. Berger is talking about the Rule 34 application that was filed by all plaintiffs after your Honor ordered the setting of a troika and joint discovery. There were changes in that.

What you have is somebody taking --

MR. KING: Mr. Spivack is testifying.

MR. SPIVACK: When you use Rule 34 you are talking about two different applications.

MR. KING: Maybe Mr. Berger could explain that

THE COURT: All right, Mr. Berger.

THE WITNESS: Well, I would explain it in this way. I don't know what Mr. Robinson had in his mind, but I do know that the facts that are set forth on page 4 of the affidavit, Exhibit No. 4, are correct. And that is that our firm became an active member of the steering committee and that we drafted the motion for production of documents which was filed in the coordinated discovery pursuant to the transfer of our cases to the Southern District of New York.

Q Had prior Rule 34 applications been prepared in subscriber cases?

A There may have been, I don't know. But on page 4 of Plaintiff's Exhibit 4 we are referring to the motion for production of documents filed by all the consolidated pretrial cases.

Q Why do you say it was the most significant discovery tool that they had? Other Rule 34 applications were already on file.

THE COURT: Because I didn't recognize anythi that came in before I appointed the troika. I complete

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ignored them. The purpose for creating the troika was to have a uniform application discovery.

Q Mr. Berger, did your firm take any depositions in this action?

A No.

Q Were any depositions taken?

A The depositions to my knowledge that were taken were in the competitors case.

THE COURT: I am sorry, that is not so. It was joint depositions purposely scheduled by me to prove to these fellows that ~~hey~~ they had conflicting interests. I ~~schedule~~ scheduled them in Wisconsin and they came back screaming. Fellows from Chicago went over to represent the Troika. In fact, I think they refused after a while to participate in it. And the whole purpose of setting it up was to prove to everybody that we had really two claims here, not one; they were conflicting, and the objectives of both groups were inconsistent. And it was done purposely by me. Those were the only depositions taken, to my knowledge, under my jurisdiction, anyhow.

Q Mr. Berger, did you ever visit the Government's document depository, or the depository in which the Government record was transferred to?

THE COURT: You mean Mr. Berger or anybody from

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his firm?

MR. KING: Mr. Berger himself.

A My firm did. I did not, myself.

Q Do you recall to whom you assigned that duty?

A Yes. Mr. Montague.

Q Do you know how much time was spent reviewing that record?

A No, but I know -- I really don't know how much time he spent there, but I know he did it and I know there were others associated with our firm who were in the depository.

Q When you say associated with your firm, do you mean employed by your or --

A Yes, employed by the firm.

Q Did you ever review any analysis of the Government record?

A Yes.

Q Prepared by --

A Mr. Montague.

Q What type of document was that?

A Well, we had a pretty good analysis made over a period of time. I don't recall the exact details at this time.

Q Was that memorandum he prepared circulated to

any members of the steering committee, to your knowledge?

A Not that I know of. It might have been. I'm not aware of it.

Q Did you ever receive analysis of the Government's record ~~of the~~ by other plaintiffs in this case?

A I'm unaware of any.

Q Mr. Berger, is it your theory in your fee application that subscribers in cities where ~~they~~ there were competitors also fall under the umbrella of your class actions, as well as subscribers in the non-competitor cities?

A Yes.

Q Is it your suggestion, at least, if not contention, that subscribers in those cities might not have been overcharged --

MR. SPIVACK: Objection, your Honor.

THE COURT: I disposed of that in the opinion approving the settlement.

MR. KING: I believe we had submitted to us as recently as the past two weeks the affidavit of Mr. Shapiro, which claimed that he didn't feel the subscribers were injured in many cities.

THE COURT: Oh, the competitors made the claim before me in the courtroom that they were the ones who had the lawsuit and the subscribers had nothing. That was

the claim made at the settlement conference.

MR. KING: And I had an idea it was a matter of regions --

THE COURT: It was perfectly obvious. That is what I meant when I set up the Madison, Wisconsin deposition; that where you had competitors you had a desire to cut the price so that the subscriber would get the benefit of it. And that is why the people from Chicago left the deposition, because they didn't prove any damages, they thought. They walked away from it. They wanted to go into a case where there were no competitors, to prove a monopoly which shot the cost up to the purchaser.

I recognized that early in the action and told that to counsel.

MR. KING: As counsel for the class representative, Mr. Berger had a fiduciary duty to those subscribers who were in fact injured to exclude the claims of those who were not injured.

THE COURT: Why?

MR. KING: So that the pie would not be dissipated.

THE COURT: Impossible to do that unless I spent 16 years of my life trying each one of the subscribers' claims. And this was a settlement which took that into

consideration and I so stated in my opinion.

MR. KING: I won't pursue that further.

THE COURT: That was the whole reason for the settlement. That is the reason I turned down the objection of the law firm in Philadelphia which wasn't happy with it.

MR. KING: My one question to Mr. Berger is what efforts he had undertaken to segregate as counsel for the class representatives those subscribers who might have been injured from those who were getting a free ride?

THE WITNESS: We were very concerned all the way through the litigation, before we filed our complaints, it was one of the problems that troubled us, the question of class. In fact, that is one of the reasons we felt there was a very serious doubt whether we could persuade Judge Metzner to certify the classes here.

We were very terribly upset about that. That was one, only one of a number of inherently difficult and complex problems attached to the class, or the class actions in this case.

Q Did you have certain meetings with the defendants to settle this case prior to the class action motions being presented?

A Yes. It is my recollection my affidavit sets these up, that there were four such meetings.

Q Four prior to the class action?

A That is my recollection.

Q Do you know how many meetings you had subsequent to the class action argument?

A I believe there were four more.

Q Does it refresh your recollection that your affidavit that the class action issue was argued, Paragraph 13 of your affidavit, on the 18th of June, you met on the 30th and you reached settlement on the 27th? Were there --

A Where is this?

Q Paragraph 13, 18 and 29 of your affidavit, that is, the affidavit marked number 4. Were there any other meetings not set forth in Exhibit 4?

MR. SPIVACK: I don't know why he needs his memory refreshed, your Honor. The affidavit says there were four meetings beginning on June 30. It is consistent with the affidavit. I don't know what the question is supposed to mean.

THE COURT: He is asking whether there were more than the four he referred to. He is entitled to ask that question.

A There were four before, your Honor. It is my recollection that there were four after that. It is my recollection we finished arguing before your Honor, I'm

sure you recall the occasion very well. ~~He~~ We left the courtroom, and I think it is fair to say that both sides were highly in doubt as to what your Honor was going to decide, and it was almost spontaneous that I said to them, don't you think we ought to really sit down now and try to work this out in light of what happened this morning, and they all said yes.

It is my recollection that we had four meetings after that and at the fourth meeting I finally nailed down what the settlement would be.

THE COURT: Does that answer your question, Mr. King?

MR. KING: Yes, your Honor.

Q Do you know how long these meetings took place, approximately?

A Some of them were quite lengthy. I don't know the exact number of hours involved, but some of them were indeed lengthy.

Q Approximately how many antitrust class action settlements have you personally been involved in in the last decade?

A I would say over ten.

Q Do you have any recollection as to how long in actual negotiation sessions it has taken you generally to

settle these class actions?

A Each one depends on its own circumstawnces. Depends on the complexities. This was a very, very complex matter because of the problems that you have touched upon, questions of the different defendants who are involved, questions of what the amount should be, and questions relating to an issue which I raised, that was the demand that we be given interest at one over prime, and that that interest should run from the date of Judge Metzner's final judgment, not from the date when his judgment became final.

Q Mr. Berger, I must ask you to confine your answers to my questions.

A Would you restate the question? I may have misunderstood it.

Q Do you consider for a $10 million settlement fund, it was settled in a relatively short period of time, namely 51-1/2 hours of negotiations, based on your experience over the years?

A Well, I would consider that we didn't waste any time. We tried vey hard to work it out with a minimum number of hours logged.

Q So the settlement was reached quickly with the defendants, ~~defendant,~~ is that right?

A It was reached as a result of at least eight

meetings which were followed by other meetings going into the details of the documentation.

Q What was your first demand from the defendants in monetary terms?

A My recollection is that I had a figure of $22 million.

Q Do you recall their counter offer?

THE COURT: Zero.

A They didn't want to settle at all.

On subsequent occasions the highest figure that I felt that if they ever wanted to settle, might be somewhere around $4 million. It was tempting because of the grave risks and uncertainties in this case, to achieve the settlement and at appropriate times at least times that I thought were appropriate, such as after the briefing of the summary judgment argument, I initiated settlement discussions.

Then, after the argument in the Second Circuit Court of Appeals, we actually had a settlement meeting. Then, after the decision of the Court of Appeals, I initiated another meeting. But we weren't getting anywhere and we never did get anywhere until finally we went through the entire briefing of the class and the presentation before Judge Metzner. And it wasn't until after

that, and it was shortly after that in the hallway of this building where I initiated the discussions again, and I felt that we had a chance of working it out. So we actually did work it out.

Q So you felt you worked it out in quick time, is that the essence of it?

A I wouldn't characterize it as quick time or not. It was very difficult, I know, and these discussions extended over a period of two years.

Q Is it surprising to you that you personally spent more time on settlement procedures than on settlement negotiations, and likewise more time on settlement administration than settlement negotiations, considering your role in the case?

A No. And the reason it doesn't surprise me is that this was one of the largest class actions which has been administered. One of the problems that I had was whether or not if we did settle the case I could persuade the Court that this was indeed a manageable class or classes.

We had 89,000 notices sent out, of which we had an unusually large response, in excess of 14,000. We had over $350 million in transactions that had to be administered, of which approximately ~~$5~~ $50 million were challenged.

There were very serious questions of procedure and administration, including but not limited to problems of how to invest the funds once we did get paid by certain defendants. So it doesn't surprise me.

Q I take it then you differ with the statement of Mr. Victor, and this is not a statement he corrected subsequently, on page 9, Paragraph 9 of his affidavit that the work done by the troika on behalf of its own clients and all of the subscribers of plaintiffs were directly contributed to David Berger PA's ability to negotiate this higher settlement fund at this point in time than would otherwise have been possible, as well as assisted in the successful generation of the fund itself?

A That is his opinion. I don't share that opinion. It is not my opinion. I know that he didn't have anything to do with the negotiations. I know that nobody had anything to do with the negotiations relating to the class or the class settlement other than my firm. I never had a discussion with Mr. Victor or anyone else except with people in my firm, with anyone who represented the ~~defendants~~ plaintiffs and the class in this settlement except Messrs. Goldberg and Specks, who had three class actions.

I told them that in the summary judgment argument that I was going to protect the interests of their

clients because they had filed their suits only within the period which was 90 days after Judge Wyzanski's July, 1967 degree on remand.

So in order to protect them I had to persuade the Court of Appeals of the Second Circuit to go all the way into September, 1968 as a cutoff date. I did have some early discussions, early in the game when we tried to work something out with the defendants, which were unsuccessful; I had some discussions with Messrs. Goldberg and Specks.

Q Were you confident from the start that these class actions would be settled, it was just a matter of what terms could be reached?

A No. I certainly was not. I was trying to persuade defense counsel to recommend settlement, and I was not making any headway at all, really, until we got out of the argument and presentation of the class action matter before Judge Metzner.

Q Have you stated previously that a vast number of class actions result in settlement after pretrial, and is that your view today?

A I am sorry, you will have to repeat that question. I didn't hear you.

Q Are you of the opinion today that the vast

number of class actions are settled after so-called pre-trial prior to litigation, actual trial of the case in court?

A I am aware of a number of them which are pending right now which are not settled.

Q Have you ever tried any class actions personally, Mr. Berger?

A My firm has completed —

Q No, personally, sir?

A What do you mean by trial? Have I gone to a judge and jury? No.

But have I been prepared to? Yes.

You want me to name some of the cases? I can.

Q I want to know which ones you have tried?

A I have not tried because 9 cases have been settled actually on the eve of trial.

Q That has been your experience in litigation, the cases have been settled on the eve of trial?

A No. The air pollution case is one in which I was lead counsel. The judge certified two classes there, on the air pollution cases. The defendants got an interlocutory appeal approved under 1292(b) which was accepted by the Ninth Circuit.

The Ninth Circuit overruled the judge with

respect to his denial of a motion to dismiss and held that the plaintiffs in that case had no standing. So there is an example of a class action where the class was actually certified after hot controversy, where the class was never decertified, where the ~~actual~~ action was not only not settled, but dismissed. I was going to try that case.

THE COURT: Let me ask you something, I am interested in this. How many class actions have gone to trial in the last ten years?

THE WITNESS: I can give you --

THE COURT: Wait. I am asking you, Mr. King.

MR. KING: I believe three, your Honor. The Potato case in Idaho; the Cast Iron Soil Pipe case in Alabama, and there is one other case of small magnitude in California that I am aware of.

THE COURT: Are you aware of any others?

THE WITNESS: Yes, sir. The ~~Cannute~~ Knuth case in the Third Circuit went to trial. The plaintiffs lost. The Dolley Madison case went to trial, was on trial for approximately 11 weeks, and then was settled.

There was a case, a 10(b)(5) case I believe before Judge Mansfiled, in the Southern District of New York, verdict for defendant. A class action.

Q Mr. Berger, this Third Circuit case you

described, or you described the name, would you describe it more fully? Is it an antitrust class action?

A Yes.

Q What were the basic allegations?

A I don't remember that. I would have to review that. My recollection is it had to do with an alleged antitrust violation committed by certain milk purchases or producers. And the case went to the Third Circuit on a class problem; it was certified as a class; went to trial, and the defendants won.

Q How about the Dolley Madison case?

A There was a 10(b)(5) class action security case.

Q That was not an antitrust case?

A No, but that was a class action case, though.

Q Getting out of the realm --

A The Cast Iron Pipe was a class action antitrust case.

Q I commented on that.

MR. SPIVACK: If your Honor would like to know the results of the Cast Iron Pipe case or the Potato case --

THE COURT: Go ahead.

Q Getting outside of the realm of class actions, has there been any jury case you tried in the last decade?

A Yes.

Q Would you identify it. Any antitrust jury case?

A Not antitrust. I tried two jury cases around the time when I filed this complaint. They were in the State Courts in Philadelphia, our Court of Common Pleas, which is the equivalent of the Supreme Court of New York.

Q Did they deal with business torts or were they under the Pennsylvania antitrust laws?

A No, they weren't. They were real estate transactions, both of which I got verdicts. Now --

THE COURT: Wait. That's all you were asked.

Q What role did you play in reconstructing your time in this case?

A The role I played was to ask Mr. Montague to review all of our records, including but not limited to transcripts, time records, travelogues or travel vouchers and notes. And I asked him to be very, very conservative in doing so. I asked him to compile all the information and he did it. And when he did it he went over it with me and I approved it.

Q Speaking to the time to which Exhibit 3, your affidavit --

A Which affidavit?

Q Exhibit 3.

A Which affidavit?

THE COURT: He says Exhibit 3.

THE WITNESS: I beg your pardon.

Q Sworn to October 30, '75. You state in Paragraph -- in several paragraphs, 2, 3, 4, that the matters set forth in the Montague affidavit are correct to the best of your knowledge, information and belief?

A That's right.

Q What role did you play with regard to the matter set forth in Paragraph 2, namely the information and belief assertion as to the time claim for you?

A Just as I explained. I asked Mr. Montague to calculate my time, and to do so on the basis of all the records we had in our office, including the daily time records plus transcripts, plus notes, plus travel vouchers and various other pleadings; and everything else that we had.

Q When was this done, Mr. Berger?

A Well, it was done -- you mean this affidavit?

Q When was the time reconstruction made for you to which you attested this affidavit?

A Well, the time that is set forth on page 9 in

Mr. Montague's affidavit.

Q Was it approximately --

A That was done, I think, around March of 1972.

Q Was that approximately the same period of time when you reconstructed the time, when your firm reconstructed the time for you for the plumbing fixtures litigation?

A I think so.

Q In your deposition in the plumbing fixtures litigation you specifically testified, in fact you volunteered that Mr. Montague, and I am reading from line 16 on page 78 --

MR. SPIVACK: Excuse me a minute, Mr. King. Let me take a look at it.

(Pause.)

Q You specifically stated that Mr. Montague didn't consult with you in reconstructing your time in that case, at approximately the same period of time as your time was reconstructed by him for you in this case. Why did you have two different rules of thumb or approaches?

A I don't recall that particular testimony.

MR. SPIVACK: Your Honor, I object to that. I think the witness should be allowed to read the page before and that page, because it's quite clear --

A I don't recall that testimony.

THE COURT: You read it.

You may step down, Mr. Spivack. Mr. Berger can find it.

(Pause.)

Q You were asking me about a figure of 256.55 hours, and I was trying to explain to you how that explicit ~~figute~~ figure was arrived at. And I said Mr. Montague calculated that figure. I didn't tell him to come up with the figure of 256.55 hours. This was in the Plumbing case. You were trying to make a point about this explicit figure, and I said he didn't consult me and I didn't consult him as to whether 256.55 should be the figure. That is what I meant by that.

I meant that he calculated that based on the calculations that were made in the manner in which I have now testified.

Q In this case you consulted at the same period of time with Mr. Montague?

A We did the same practice here as in that case. I never said to Mr. Montague in this case, put down X number of hours for this category or Y hours for that category. All I said to him was, review all of our records and do what is the correct way to come up with the best calcula-

tion of my time.

That would be to look over the daily time sheets, transcripts, court appearances, travelogues, notes of meetings, pleadings, all of these various matters which we had in our office.

But I didn't tell him how many hours to put for anything. That is what I meant. So I followed the same practice in this case as I did for the Plumbing case.

MR. KING: I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. SPIVACK:

Q Have you ever represented the Port of New York Authority?

A Yes.

Q In antitrust matters?

A Yes.

Q Have you filed complaints on their behalf?

A I filed at least one that I can ~~rember.~~ remember. I may have filed more than one.

Q Who was the general counsel for the Port Authority in 1968?

A Mr. Sidney Goldstein.

Q Did Mr. Goldstein discuss the ~~Berger~~ Burglar Alarm

Matter with you?

A He may have, but I believe the discussions we had with the law department of the Port Authority at that time were conducted with Mr. Nathaniel Fensterstock.

Q Those discussions had nothing to do with Mr. Robinson; they were direct discussions between Mr. Fensterstock and your firm?

A Yes.

Q At the time when Mr. Fensterstock worked for the Port Authority?

A Exactly, correct.

Q Based on your experience, Mr. Berger, is it common among plaintiffs' attorneys at the antitrust bar to circulate among themselves complaints that they have ~~received~~ drafted?

A It certainly is not uncommon. We have received many requests which we normally honor and, on the other hand, we have made requests of other counsel to send us copies of their complaint.

MR. SPIVACK: No further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Do you have any other witnesses or do you want to wait until after lunch?

els

MR. SPIVACK: I have no other witnesses, your Honor, but I do want to offer two letters. One is the letter from Mr. Brislin to Mr. King on April 17, 1975, notifying him that Judge Metzner would hold a hearing in September, '75, telling him if he wanted any discovery, he should begin.

I would like that marked Plaintiff's Exhibit 8 for identification.

THE COURT: Any objection?

MR. KING: No, your Honor.

(Plaintiff's Exhibit 8 was received in evidence.)

xx MR. SPIVACK: Another one is a letter that Mr. Brislin sent to Mr. King on October 7, '75, reaffirming that the time records were available if Mr. King wanted to examine them. I offer that as Plaintiff's Exhibit 9 for identification.

THE COURT: Any objection?

MR. KING: No, your Honor.

(Plaintiff's Exhibit 9 was received in evidence.)

xx MR. SPIVACK: That's all I have, your Honor.

MR. KING: Your Honor, I have four exhibits which Mr. Spivack indicated that he has no objection.

els

One is a November 6, 1975 letter to Mr. Brislin, which would be C.

(Defendant's Exhibit C was marked for identification.)

MR. KING: The second is a September 2, 1975 letter to this Court from William Simon, which would be D.

(Defendant's Exhibit D was marked for identification.)

MR. KING: The next exhibit is a September 25, 1975 letter from the Court to all counsel, which would be E.

(Defendant's Exhibit E was marked for identification.)

MR. KING: The last exhibit is a a chart dated January 10, 1975 entitled Most Favorable Subscriber Settlement Basis Applied to Pending Cases.

THE COURT: Is this the one that is attached to this?

Any objection?

MR. SPIVACK: No, your Honor.

(Defendant's Exhibit F was received in evidence.)

MR. KING: We have nothing further, your Honor.

THE COURT: The matter is then marked submitted.

els

Yes, Mr. Simon.

MR. SIMON: I asked if there was going to be any oral argument or any post-trial briefs.

THE COURT: I see no necessity for it. I have had your briefs submitted in advance of this hearing. I have listened to the testimony, and all the testimony was available to you when you submitted the briefs.

MR. SIMON: As I said earlier, we don't want t write any briefs that your Honor doesn't want to read, but I think there's a great deal that we could comment on to this Court that might help the Court in --

THE COURT: You had sufficient time to submit that on October 31st. You knew what the proof was going to be. That is why I fixed a date for briefs.

MR. SIMON: I just want the record to be clear that we think there is a great deal that we could bring to be helpful.

THE COURT: And I want the record to be clear you had ample opportunity to do that before this hearing.

MR. SIMON: That is not true.

THE COURT: That is true.

(Time noted: 1.05 p.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
H. Laddie Montague, Jr.	2	3		
Herbert B. Newberg	27	28	47	
David Berger	53	59	98	

EXHIBIT INDEX

	Identification	In Evidence
Plaintiff		
1		3
2	28	28
3	53	
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5	55	56
6	57	57
7	58	58
8,9		100
Bay Fair		
A	39	
Defendant		
A		51
B		71
C	101	
D	101	
E	101	
F		101

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF DETROIT, et al.,	:	
v.	:	Nos. 76-7252, 76-7253 and 76-7254
GRINNELL CORPORATION, et al.	:	
BAY FAIR SHOPPING CENTER, et al., Claimants,	:	
Appellants.	:	

STIPULATION CORRECTING
RECORD ON APPEAL

Pursuant to Rule 11(e) of the Federal Rules of Appellate Procedure, it is hereby stipulated between the parties, by their undersigned counsel, that the Transcript of the Record of Proceedings Dated November 10, 1975, included in the Record heretofore filed herein, be corrected or amended as follows:

Page 2

Line 15 -- "1266 Locust Street" should read "1622 Locust Street".

Page 4

Line 9 -- "Nerberg" should be "Newberg".

Line 12 -- A comma should be inserted after the word "belief".

Line 14 -- A comma should be inserted after the word "that" and after the word "records".

Page 8

Line 19 -- "broad" should be "routine" and "a sort" should be "the sort".

Page 11

Line 2 -- The word "for" should be followed by the word "it".

Line 15 -- The word "in" should be inserted after the words "you know,".

Line 16 -- A period should follow the word "orders" and a new sentence should start with the word "The".

Page 12

Line 5 -- The word "in" should be "on".

Page 14

Line 16 -- "that" should be "then". The word "may" should be inserted after the word "they".

Line 23 -- "in" should be omitted.

Page 15

Line 6 -- "corres-ondence" should be "corres-pondence".

Line 14 -- "H" should be "J".

Page 16

Line 19 -- "even" should be "either".

Line 21 -- "that" should be inserted before "would".

Page 17

Line 2 -- "was" should be "were".

Page 18

Line 2 -- The first word "period" should be omitted.

Line 11 -- "tme" should be "time".

Line 21 -- A comma should be inserted after the word "coming" and after the word "happened".

Page 22

Line 21 -- "committee" should be inserted after "action".

Page 24

Line 9 -- "evident" should be "evidenced".

Line 13 -- "or" should be "of".

Page 29

Line 10 -- "was" should be "were".

Page 30

Line 3 -- "favored" should be "vague".

Line 19 -- "look" should be "looking".

Page 33

Line 3 -- "accurately" should be "actually".

Line 12 -- "C" should be "fee".

Line 19 -- "C" should be "fee".

Page 36

Line 2 -- "wel" should be "well".

Line 13 -- A comma should be inserted after "participated".

Line 14 -- "and" should be "in".

Page 40

Line 25 -- "special" should be "commercial".

Page 43

Line 24 -- "co-ment" should be "comment".

Page 46

Line 19 -- "hourse" should be "hours".

Page 50

Line 21 -- Should read "because the competitors wanted 5-A not independent".

Line 22 -- Should read "of 5-B. They were going. . ."

Page 56

Line 18 -- Should read "MR. SPIVACK: Mr. Berger. . ."

Line 19 -- "Rose" should be "Ross".

Page 57

Line 2 -- "Exhibit --" should be "Exhibit 6".

Line 12 -- "Rose" should be "Ross".

Line 13 -- "first" should be "firm" and a comma should be inserted after the word "firm".

Line 20 -- "firm" should be "firms".

Page 58

Line 14 -- A comma should be inserted after the word "Lord".

Page 60

Line 3 -- "die-" should be "dis-".

Page 62

Line 21 -- "as" should be "is".

Page 63

Line 22 -- "payable" should be "paying".

Page 65

Line 10 -- "Now" should be "No".

Line 18 -- "recover" should be "cover".

Page 66

Line 3 -- "class's" should be "classes'".

Line 7 -- "class" should be "classes".

Page 67

Line 2 -- "don's" should be "don't".

Line 9 -- "feel" should be "fee".

Page 68

Line 16 -- "you" should be "You".

Page 69

Line 3 -- A comma should be inserted after "action", the word "a" should be omitted, and "action" should be "actions,".

Line 17 -- "That" should be "There".

Line 20 -- "beforre" should be "before".

Page 71

Line 13 -- "beliefe" should be "believe".

Line 20 -- "connects" should be "corrects".

Page 73

Line 23 -- A period should be inserted after the word "essential".

Page 76

Line 14 -- "Rul3" should be "Rule".

Page 79

Line 3 -- "application discovery" should be transposed to read "discovery application".

Line 12 -- "hey" should be "they".

Line 13 -- "schedule" should be "scheduled".

Page 81

Line 6 -- "of the" should be "by other".

Line 9 -- "they" should be "there".

Page 82

Line 5 -- A period should be inserted after the word "obvious" and a new sentence should begin with the word "That".

Line 10 -- "becasue" should be "because".

Page 84

Line 23 -- A comma should be inserted after the word "before".

Page 85

Line 2 -- "He" should be "We".

Page 86

Line 16 -- The word "a" should be inserted after the word "for".

Line 24 -- "defendant;" should be "defendants;".

Page 87

Line 23 -- "wheres" should be "where" and "anywheres" should be "anywhere".

Page 88

Line 12 -- "settle" should be "settlement".

Line 25 -- "$5 million" should be "$50 million".

Page 89

Line 19 -- "I" should be inserted before "never".

Line 21 -- "defendants" should be "plaintiffs".

Page 90

Line 9 -- "defendant," should be "defendants,".

Line 21 -- "in settlement" should be inserted after "result".

Page 91

Line 16 -- "becauses" should be "because".

Page 92

Line 6 -- "actual" should be "action" and the word "not" should be inserted after "only".

Line 18 -- "Cannute" should be "Knuth".

Line 20 -- "Dolley" should be "Dolly".

Page 93

Line 12 -- "Dolley" should be "Dolly".

Page 97

Line 9 -- "figute" should be "figure".

Page 98

Line 20 -- "rember" should be "remember".

Line 25 -- "Berger" should be "Burglar".

Page 99

Line 16 -- "received" should be "drafted".

Page 102

Line 11 -- "ocmment" should be "comment".

Line 13 -- "tim" should be "time".

Dated: New York, New York
July , 1976

LORD, DAY & LORD

By _____

Counsel for David Berger, P.A., Counsel for Class Representatives - Appellee

HOWREY & SIMON

By _____

875 Counsel for Bay Fair Shopping Center, et al., Claimants - Appellants

Plts. Exh. 1.

10/28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et. al.	:	68 Civ. 4026 (E.D. Pa. Civ. 68-1478)
v.	:	
GRINNELL CORPORATION, et. al.	:	M 19-92

MANHATTAN-WARD, INC., et.al.	:	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
v.	:	
GRINNELL CORPORATION, et. al.	:	

1225 VINE STREET BUILDING, INC.	:	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)
v.	:	
GRINNELL CORPORATION, et al.	:	

COMMONWEALTH OF PENNSYLVANIA	:	
	ss	
COUNTY OF PHILADELPHIA	:	

AFFIDAVIT

H. LADDIE MONTAGUE, JR., being first duly sworn according to law, deposes and says:

1. I am submitting this affidavit to classify and describe the time expended on the above-captioned litigation since its inception through October 9, 1975 by attorneys in the firm of David Berger, P.A., Attorneys At Law ("the Berger firm"), including its predecessor, now Cohen, Shapiro, Polisher, Shiekman and Cohen (formerly

Cohen, Shapiro, Berger, Polisher and Cohen). I will further describe the status and experience of the individual attorneys involved and the normal billing practices of our firm. Lastly, I will describe the current status of this litigation and the settlement.

A. TIME RECORDS OF THE BERGER FIRM

2. The time records of the Berger firm have been compiled and reviewed pursuant to my supervision and direction. I have also consulted Herbert B. Newberg concerning these time records.

3. Until September of 1970, Messrs. Berger, Montague, Newberg, Schambelan, Lerner and Rodos were with the firm of Cohen, Shapiro, Berger, Polisher and Cohen (hereinafter "Cohen firm"). For all periods relevant to this litigation up until September, 1970, the practice of attorneys at the Cohen firm with respect to recording time expended was for each attorney to keep time records, usually to be filled in at the end of each day (if circumstances permitted) or at the end of each week. These time records set forth the case worked on, the time expended and included a generalized code for the type of activity involved. Sometimes a description of the work was given. These time records were then recorded and logged on a computer system.

4. In September of 1970, David Berger, Herbert B. Newberg and H. Laddie Montague, Jr. separated from the Cohen firm and formed David Berger, P.A. (then consisting of five attorneys).*/ There was a period of time after this

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*/ H.L. Schambelan and G.J. Rodos also left the Cohen firm and joined David Berger, P.A.

separation when no uniform procedure for maintaining time records was established. However, commencing sometime in February, 1971, daily time record forms were established and available for use by all attorneys of the Berger firm. From that time forward, daily time records (where possible) or weekly time records were to be maintained by each attorney. Copies of these time records have been maintained and are available. During the period September 1970 through February 1971, individual attorney's time records are sporadic. Other lapses in time records, if any, will be described infra, in relation to each individual attorney's records.

5. All of the time identified on Exhibits "A" through "F" annexed hereto */ and hereinafter described, was taken from the various time records previously described, with the following exceptions:

(a) Where time records of one attorney reflected that another attorney also worked on this case on a particular date, credit was also given for the other attorney's work so reflected.

(b) Where court appearances reflected an attorney's participation, but there is no existing time record evidencing that participation, time was reconstructed and included on the exhibits.

(c) With respect to Mr. Newberg, his time was reconstructed for the period November, 1970 through March, 1972, during which span he kept no daily time records for this case.

---

*/ The courts in Lindy Bros., 382 F. Supp. 999 (E.D. Pa. 1974) and in Grunin v. International House of Pancakes (IHOP) M.D.L. No. 77 (W.D. Mo., Order of July 11, 1975) accepted time which was recorded and/or reconstructed in the manner in which Petitioner has recorded and/or reconstructed its time herein.

(d) Where a meeting is reflected in an attorney's notes or on his calendar or travel vouchers, but where there is no existing time record evidencing that participation, time was reconstructed and included on the exhibits.

6. No time recorded has been included more than once. For instance, if any attorney expended one hour of work on behalf of twenty clients, only one hour of time was recorded.

7. (a) Through October 9, 1975, the total time expended by the Berger firm in the prosecution of this class action litigation is as follows:

	Hours:
(i) By Attorneys:	
David Berger	534.30
H. Laddie Montague, Jr.	1585.50
Herbert B. Newberg	697.50
Harold Berger	76.75
Alexander Frey	113.00
Warren D. Mulloy	13.75
A. L. Lerner	23.50
H. L. Schambelan	44.45
J. R. Lally	44.00
J. C. Meredith	47.25
L. Barrack	4.00
E. D. Greenburg	306.75
G.J. Rodos	40.50
M. G. Davidoff	3.00
P.C. Cohen	32.00
B. Shaw	10.00
B. K. Cohen	1.50
TOTAL:	3577.75 Hours
	5918.60 Hours
(ii) By Paralegals	1653 Hours */
(iii) By Certified Public Accountants:	
Partners:	160 Hours
Supervisors:	210 Hours
Associates:	491 Hours
Assistants :	792 Hours

*/ Annexed hereto as Exhibit "G" are true and correct copies of two invoices submitted by Heffler & Company, C.P.A. Petitioner has not, to date, been reimbursed for any of these costs.

(b) It is estimated that an additional 400 hours */ will be expended by attorneys and an additional 750 paralegal hours will be expended.

(c) Of the total of 3577.75 attorneys' hours expended through October 9, 1974, 2995 hours or 83.7% were expended up to and through the Court of Appeals' decision affirming this Court's approval of the settlement:

ATTORNEYS	HOURS UP TO 3/14/74 and %	HOURS AFTER 3/14/74 and %
David Berger	427.3 (80%)	107 (20%)
H.L.Montague, Jr.	1323 (83.4%)	262.5 (16.6%)
Herbert B. Newberg	697.5 (100%)	0 (0%)
Other Attorneys	547.2 (72%)	213.25 (28%)
TOTALS:	2995 (83.7%)	582.75 (16.3%)

*/ This includes an estimated 100 hours concerning the fee award proceedings and 300 hours for settlement procedure and administration.

8. Except for the time set forth in paragraphs 13, 14(b), and 15(c) infra, Exhibits "A" through "F" set forth the time expended in daily chronological order by Messrs. David Berger, Montague, Newberg, H. Berger, Frey and Greenburg */.

9. I have attempted to categorize the time expended by Petitioner in the prosecution of these cases in the following categories:

(a) Pleadings and Motions:

This category includes drafting, reviewing and filing of all pleadings and motions dealing with the merits and procedures involved in this litigation.

(b) Discovery:

This category includes all time expended in drafting and reviewing interrogatories and Rule 34 requests; responding and objecting to defendants' interrogatories; inspecting and analyzing documents produced pursuant to Rule 34 requests; and independent factual investigation.

(c) Court Appearances and Preparation:

This category includes all court appearances and conferences and preparation therefor, except it does not include appearances and matters relating to either the appeal from the Order approving the Settlement or to the fee award or appeals therefrom. It does include the court appearance and preparation relating to the appeal of the statute of limitations issue.

(d) Settlement Negotiations:

This category includes all negotiations relating to the settlement, including the terms of the settlement and the settlement agreement, and all preparation necessary for these negotiations.

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*/ These hours represent 92.6% of the total attorneys' hours expended by Petitioner.

(e) Settlement Procedures:

This category includes time expended on drafting and/or preparation of legal documents for the approval of the settlement by the court, including but not limited to: drafting the settlement agreement, drafting settlement orders and forms of notice, preparation of motions, answers and legal briefs either in response to papers filed in the District Court by objectors to the settlement or in support of the settlement. It also includes such activities as drafting and obtaining approval of the Final Judgment approving the settlement and dismissing the defendants from this action. It also includes work performed with regard to subsequent notices to the class, subsequent Settlement Orders submitted to the Court for approval, conferences with the Court and Special Master concerning procedures for resolving challenges to statements of claim, and the drafting of all notices, affidavits and other documents (excluding legal briefs) necessary for the resolution of those challenges to statements of claim.

(f) Settlement Administration:

This category involves time expended in the administration of the class action. It includes, but is not limited to, the following: establishing a uniform procedure for reviewing and investigating claims; establishing criteria and guidelines for objecting to or challenging claims; review and investigation of claims; responding to telephone calls and written inquiries from class members and/or their attorneys; reviewing requests by claimants for review of challenges; and conferences (by telephone or in person) with claimants attempting to cure any challenges to claims. The ministerial portion of the work relating to

Settlement Administration was performed by paralegals under the direction and supervision of attorneys in the Petitioner's firm. Mathematical analysis of claims and mathematical calculations were performed by certified public accountants. The work of attorneys was primarily limited, wherever possible, to decision making functions or functions requiring the exercise of legal judgment.

(g) Fee Application:

This category includes all time expended by Petitioner with regard to all matters relating to Petitioner's request for a fee award, appeals therefrom and remand proceedings. This includes all petitions and affidavits, memoranda and briefs, court appearances and preparation therefor and all other matters relating to a fee award.

(h) Briefs and Legal Research:

This category involves all legal research and legal writing for all aspects of this litigation, except it does not include time expended in connection with the appeal from the settlement approval by the District Court or in connection with any fee matters. It does include legal research and writing in connection with the statute of limitations appeal.

(i) Appellate Proceedings After Final Judgment:

This category relates solely to time expended on behalf of Appellees in the appeal taken from the District Court's final Order approving the Settlement. It includes all legal research and writing and court appearances and preparation directly related to the settlement appeal. It does not include time expended relating to the statute of limitations appeal or to the fee appeal.

(j) General:

This category covers time expended relating to general preparation, correspondence, telephone, file review, conferences with other plaintiffs' counsel or within the Berger firm and time not otherwise specifically allocated.

10. Exhibit "H" annexed hereto is a compilation by me of the following information relating to time expended through October 9, 1975:

(a) Total time of attorneys of the Berger firm as a group by category of activity;

(b) Total time of paraprofessionals of the Berger firm as a group by category of activity; and

(c) Total time spent by each attorney as to each category of activity.

11. At all times, David Berger was the attorney within the Berger firm in charge of this litigation and was responsible for all decisions of strategy and tactics made in this case in conjunction with Messrs. Montague and/or Newberg. Moreover, all settlement negotiations were conducted by Mr. Berger.

12. Annexed hereto as Exhibit "A" is a schedule of Mr. Berger's time expended in this litigation through October 9, 1975*/ and listed in accordance with the standards set forth in paragraph no. 5, supra.

David Berger, until April, 1972, did not regularly maintain contemporaneous time records. Thereafter, he did.

The time recorded for Mr. Berger in Exhibit "A" is for time or events set forth in time records or evidenced

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*/ Except for the additional time listed in ¶13, infra.

by and reconstructed from court appearances, notes from meetings, calendar entries or expense vouchers.

13. In addition to the time listed in Exhibit "A", the following is a conservative reconstruction of time expended by Mr. Berger on particular matters relating to this litigation, for which no time sheets, court appearances or notes of meetings are available:

(a)	Pre-complaint investigation:	10 hours
(b)	Summary Judgment Briefs:	10 hours
(c)	Brief Contra AFADEL Motion to Dismiss:	1 hour
(d)	Preparation and Review of initial class action brief (filed January 8, 1971);	10 hours
(e)	Preparation and Review of Reply Class Action Brief (filed March 31, 1971):	15 hours
(f)	Drafting of settlement agreements, negotiations by telephone:	10 hours
(g)	Preparation and drafting of Response to Motions and Briefs of Objectors to the Settlement:	10 hours
(h)	Settlement Administration (Class Action Committee):	15 hours
(i)	Miscellaneous conferences, telephone calls, correspondence	15 hours
	TOTAL (a) through (i)	96 hours

The foregoing time was reconstructed by Messrs. David Berger and Montague sometime prior to April, 1972. In performing the reconstruction, Messrs. David Berger and Montague reviewed various files in this litigation and reviewed their activities generally in this litigation. */

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*/ The court in IHOP, supra, accepted time which was reconstructed in the manner in which Petitioner has reconstructed its time herein.

14. (a) Except for the time listed in ¶14(b), infra, Exhibit "B" annexed hereto is a schedule of time expended by H. Laddie Montague, Jr. in this litigation. All time listed in Exhibit "B" was taken from time records or other records maintained by Mr. Montague in the manner described in paragraphs 3, 4 and 5 (a) (b) and (d), supra, except as described hereinafter.

(b) Mr. Montague's time records indicate that there are gaps in time when he did not fill out formal time records. For example, during October, November and December 1970, and January and part of February, 1971, Mr. Montague did not maintain formal time records. However, for some days during that period, he kept very informal time records, some of which are not as complete in informational detail as formal time records. For certain limited periods, there were no time records maintained at all. For instance, there are no time records, formal or informal, for Mr. Montague during the periods December 3, 1970 to January 8, 1971; July 8, 1971 through October 3, 1971; and October 8, 1971 through December 14, 1971. For these periods, Mr. Montague has conservatively reconstructed the time expended by him */ on the matters indicated:

(i)	Initial Class Action Brief;	10 hours
(ii)	Drafting Settlement Orders Nos. 1 and 2 and Class Action Notice;	30 hours
(iii)	Drafting Settlement Agreement;	15 hours
(iv)	Preparation for Hearing of November 24, 1971 for preliminary approval of Settlement and approval of form of Notice to Class members;	10 hours **/
	TOTAL:	65 hours

*/ The court in IHOP, supra, accepted time which was reconstructed in the manner in which Petitioner has reconstructed its time herein.

**/ These hours are in addition to the time set forth on Exhibit "B".

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15. (a) Annexed hereto as Exhibit "C-1" is a schedule of time expended by Herbert B. Newberg from 1968 through October, 1970 and for the month of April, 1972 in this litigation. All time through October, 1970, was taken from time records maintained by Mr. Newberg in the manner described in paragraph 3, supra. The time for April, 1972, was taken from time records maintained by Mr. Newberg in the manner described in paragraph 4, supra.

(b) The computer print-out for time records maintained at the Cohen firm for Mr. Newberg shows time expended by him through October 31, 1970, in the above captioned actions to be 146.5 hours. A true and correct copy of the computer print-out through October 31, 1970 is annexed hereto as Exhibit "C-2". However, Petitioner has only been able to find at the Cohen firm back-up sheets during this period for 128.5 hours. The additional 18 hours have been charged to the category of "General" time.

(c) From November, 1970 through March, 1972, Mr. Newberg did not maintain daily time records. However, in April, 1972, he reconstructed on a monthly basis the time expended by him during that period by reviewing his work files, pleadings and briefs' files, correspondence files, calendar and other relevant documents. (See Affidavit of Herbert B. Newberg, Esquire, dated October 9, 1975, filed concurrently herewith.)

16. Annexed hereto as Exhibit "D" is a schedule of time expended by Harold Berger in this litigation.

17. Annexed hereto as Exhibit "E" is a schedule of time expended by Professor Alexander H. Frey in this litigation.

18. Annexed hereto as Exhibit "F" is a schedule of time expended by Earl D. Greenburg in this litigation.

B. STATUS OF THE BERGER FIRM

19. David Berger, P.A., Attorneys at Law, is a professional association or corporation. It was formed in September, 1970 by certain attorneys in the Cohen firm. Since its inception, its executive committee, who are the equivalent of members of the firm in a partnership, have been Mr. D. Berger, Mr. Montague and Mr. Newberg until he left the firm in 1972. Former Judge Harold Berger has been a member of the Executive Committee since he joined Petitioner's firm in 1972. Warren D. Mulloy and Leonard Barrack are also members of the Executive Committee.

20. David Berger was a senior partner at the firm of Cohen, Shapiro, Berger, Polisher and Cohen, until he left in 1970. Thereafter, he formed the Professional Association of David Berger, P.A.

Mr. D. Berger is an honors graduate of the University of Pennsylvania (B.A. 1932) and its Law School (LL.B. 1936), where he was ranked second in his class, was a member of the Order of the Coif, and editor of the University of Pennsylvania Law Review. Upon graduation, he became assistant to Professor Francis H. Bohlen and was admitted to practice in Pennsylvania in 1938. He was Chancellor of the Philadelphia Bar Association in 1963. He has served as a member of the Advisory Committee of the Antitrust and Trade Regulation Report

(BNA) since 1964, and has served as a member of the United States Supreme Court Advisory Committee on the Federal Rules of Evidence since 1965. He was City Solicitor of the City of Philadelphia from 1956 until 1963. He is currently Dean of the International Academy of Trial Lawyers.

21. Herbert B. Newberg was a partner at Cohen, Shapiro, Berger, Polisher and Cohen until he left to join David Berger, P.A., in 1970. There, he was a member of the Executive Committee. Mr. Newberg left David Berger, P.A. in 1972 and is now the senior member of his own firm. He is currently writing a trial manual on class actions for publication.

Mr. Newberg was graduated first in his class at the University of Pennsylvania Wharton School (B.S. 1958). He received his law degree from Harvard Law School (J.D. 1961). He was admitted to the Supreme Court of Pennsylvania in 1962. Mr. Newberg was an Assistant City Solicitor of the City of Philadelphia until 1964 when he joined Mr. Berger in the practice of law. Mr. Newberg has published several articles relating to class action litigation.

22. H. Laddie Montague, Jr. was associated with Cohen, Shapiro, Berger, Polisher and Cohen and refused a partnership offer there to join David Berger, P.A. in 1970 as a member of the Executive Committee.

Mr. Montague was graduated from the University of Pennsylvania (B.A. 1960) and the Dickinson School of Law (LL.B. 1963) where he was a member of the Board of Editors of the Law Review. He was admitted to the Supreme Court of Pennsylvania in 1964 and to the courts of the District of Columbia in 1965. Mr. Montague has often lectured on class action and antitrust litigation to the Pennsylvania Bar Institute.

23. The standing of Petitioner in successfully conducting major class action and antitrust litigation is among the highest in the country, as has been recognized by numerous Courts that have observed Petitioner's work.

24. In the brass mill litigation, Judge Fullam found concerning Petitioner and its co-lead counsel in awarding their fee that "[T]he abilities and standing of petitioning counsel are very high." Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557, 559 (E.D.Pa. 1969).

25. In Professional Adjusting Systems of America, Inc. v. General Adjusting Bureau, 352 F.Supp. 648, 651 (E.D. Pa. 1972), Judge Newcomer referred to Mr. Berger as "one of the most able antitrust lawyers in the country..."

26. After a full evidentiary hearing on remand in Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator

& Standard Sanitary Corp., 1974-2 Trade Cases ¶75,361 (E.D. Pa. 1974), Judge Harvey found that Mr. Berger was a "highly skilled and experienced" attorney and that the members of his firm "were likewise highly competent practitioners" (at pp.98,164-98,165). Judge Harvey also found that Mr. Berger had "...an unequalled national reputation as a plaintiffs' class action attorney" (at p.98,157), that his experience in national class action litigation could "...hardly be equalled by any attorney in the country," (at p.98.165) and that he "...was not only capable of successfully conducting a national class action litigation, but was also possessed of a visible track record which demonstrated his successes in this field." (At p.98,157).

27. Petitioner is one of the most experienced plaintiffs' antitrust firms in the country. Major antitrust cases which Petitioner has completed or which are now pending include, inter alia, the following:

City of Philadelphia v. Morton Salt Company,
248 F.Supp. 560 (E.D.Pa. 1965);
Philadelphia Electric Company v. Anaconda American Brass Company,
43 F.R.D. 452 (E.D.Pa. 1968);
Illinois v. Harper & Row Publishers, Inc.,
301 F.Supp. 484 (N.D. Ill. 1969);

City of Philadelphia v. Sterling Faucet Company,
(E.D.Pa. C.A. No. 43923);
Regal-Tyson, Inc. v. Globe Ticket Company,
(E.D.Pa. C.A. No. 43221);
City of Philadelphia v. General Host Corporation,
(E.D.Pa. C.A. No. 68-704);
City of Philadelphia v. United States Steel Corporation,
(E.D.Pa. C.A. No. 39517);
City of Philadelphia v. Interpace Corporation,
(E.D.Pa. C.A. No. 43008);
Kirihara v. Bendix Corp.,
1969 CCH Trade Cases ¶72,941 (D.Haw. 1969);
County of Lackawanna, Pennsylvania v. Automobile Manufacturers Association,
(C.D.Cal., M.D.L. Docket No. 31) (re motor vehicle air pollution control devices;
City of Philadelphia v. Emhart Corporation,
50 F.R.D. 232 (E.D.Pa. 1970) (re master lock and key systems);
City of Philadelphia v. Chas. Pfizer and Sons, Inc.,
(E.D.Pa. C.A. No. 68-144) (re antibiotics).
Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation,
(E.D.Pa. C.A. No. 41773) (re plumbing fixtures);

City of Detroit v. American Bakeries Company,
(E.D.Mich. C.A. No. 33046) (re bakery products);
City of Philadelphia v. American Oil Company,
(53 F.R.D.45 (D.N.J. 1971) (wholesale and retail gasoline);
City of Philadelphia v. General Motors Corporation,
(E.D.Pa. C.A. No. 70-2753) (re Governmental auto fleet discounts);
State of Michigan v. American Cast Iron Pipe Company, et al.,
(N.D. Ala. 71-1122-S) (re cast iron pipes);
State of Connecticut v. National Broiler Marketing Association,
C74-1257A (N.D. Ga.);
Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc.,
72 Civ. 5122 (S.D.N.Y.).
Dorey Corporation, et. al. v. E.I. du Pont Nemours & Co., et. al.
74 Civ. 3826 (S.D.N.Y.)

NON-CLASS ACTION ANTITRUST CASES

Penn Galvanizing Co. v. Lukens Steel Co.,
Civ. No. 71-820 (E.D.Pa.);
Samuel J. Lefrak, et al. v. Arabian American Oil Co., et al.,
Civ. No. 74-C-1700 (E.D.N.Y.);
Allen Organ Co. v. International Rockwell, Inc,
363 F.Supp. 1117 (E.D.Pa. 1973);

Belmont Industries v. Bethlehem Steel Corp., Civ. No. 70-3488 (E.D.Pa.); Data Research Corporation, et al. v. International Business Machines Corporation, 71 Civ. 1451 (S.D.N.Y.).

28. In City Of Philadelphia v. Morton Salt Company, supra, Petitioner (Messrs. Berger, Montague, Newberg) acted as lead counsel in establishing a national Governmental class under Rule 23 prior to its amendment against producers of rock salt. The copper pipe and brass mill tube cases were the first price-fixing treble damage actions under amended Rule 23 in which a national class was upheld. 43 F.R.D.452 (E.D.Pa. 1968). In Illinois v. Harper & Row Publishers, Inc., supra, Petitioner (Berger and Newberg) successfully represented a class on behalf of governmental bodies and school districts throughout the United States. In City of Philadelphia v. Interpace Corporation, 438 F.2d 401 (3d Cir. 1971), Petitioner (Berger and Montague) successfully represented eight statewide Governmental classes. Petitioner (Berger and Montague) is lead counsel in a pending nationwide class action on behalf of all independent property insurance adjusters, PAIC v. General Adjustment Bureau, Inc., 64 F.R.D. 35 (S.D.N.Y. 1974).

29. Messrs. Newberg and Montague have been associated with Mr. Berger since 1964 and their primary experience since that time has been in the area of private antitrust

litigation. Messrs. Berger, Newberg and Montague together prosecuted the Rock Salt case, City of Philadelphia v. Morton Salt Co., et al., Civ. No. 33781 (E.D.Pa.) commenced in July 1963, fully pretried and settled only after all discovery was completed. Messrs. Berger, Newberg and Montague were responsible for the national deposition program taken in the rock salt cases.

Messrs. Berger, Newberg and Montague were also counsel for plaintiffs in the steel wheel cases, City of Philadelphia v. United States Steel Corporation, et al., Civ. No. 39517 (E.D.Pa.) wherein Mr. Newberg took all the depositions on behalf of plaintiffs. The steel wheel case was settled during the deposition program.

Messrs. Berger and Montague conducted the "East of the Rockies" Concrete Pipe Antitrust Litigation, which resulted in a $5,000,000 settlement on behalf of eight statewide governmental classes.

30. Mr. Berger is lead counsel for plaintiffs in the Penn Central Securities Litigation, (M.D.L. Docket No. 56). In 1973, Mr. Berger concluded a trial before Judge John P. Fullam in the Penn Central Railroad Reorganization Proceedings, Bankruptcy No. 70-341, (E.D.Pa.) seeking to declare invalid a $300 million pledge by Penn Central Transportation Co. to 53 banks of all the shares of the Pennsylvania Company,

on the grounds, inter alia, that Section 10 of the Clayton Act had been violated. Decision in that case is pending.

As co-lead counsel in the Ampex Securities Litigation, Mr. Berger successfully argued the class certification issues before the Ninth Circuit Court of Appeals. Blackie v. Barrack, ___F 2d___, CCH Fed. Securities Law Rep. ¶95,312 (9th Cir. 1975).

He has argued in the United States Supreme Court and numerous Federal Courts of Appeals as well as state courts of last resort including the Pennsylvania Supreme Court.

31. Mr. Montague has tried a number of antitrust cases and has argued in numerous Federal Courts of Appeals.

32. Harold Berger is a member of the Executive Committee of Petitioner. He is a graduate of University of Pennsylvania Law School (LL.B. 1951) and was admitted to practice in Pennsylvania in 1952. He is a former Judge of the Court of Common Pleas of Philadelphia County (1971-72), is a past President of the Philadelphia Chapter of the Federal Bar Association (1968-1970) and is the author of numerous law review articles.

33. Professor Alexander H. Frey is of Counsel to Petitioner and is a member of the Executive Committee. Professor Frey received his LL.B. degree from Yale University in 1921 and J.S.D. degree from the same University in 1925. He was admitted to practice in Connecticut in 1921, as well as New York in 1932 and Pennsylvania in 1934. He has been a Professor of Law at the University of Pennsylvania since 1932 to the present.

34. Warren D. Mulloy joined the Berger firm in December of 1972 as head of its Franchising Department. He was appointed shortly thereafter as a member of the firm's Executive Committee.

Mr. Mulloy was graduated from Dartmouth College (B.A. 1951) and the University of Pennsylvania Law School (J.D. 1954). He was admitted to the Supreme Court of Pennsylvania in 1955 and has subsequently been admitted to various federal courts including the Supreme Court of the United States.

Prior to joining the Berger firm, Mr. Mulloy had been in the active practice of law, being first an associate with the law firm of White, Williams & Scott, in Philadelphia in its Litigation Section. Mr. Mulloy spent twelve years on the legal staff of the Penn Central Company and its predecessor, the Pennsylvania Railroad Company where he engaged in litigation throughout the United States, at times representing all of the railroads in the Eastern United States. Immediately prior to joining the Berger firm, Mr. Mulloy had served in the United States Attorney's Office for the Eastern District of Pennsylvania, first as Chief of the Civil Division of that office and later, as First Assistant United States Attorney.

Leonard Barrack has been associated with Petitioner

since 1971 and became a member of its Executive Committee in 1974. Mr. Barrack was graduated from the Law School of Temple University (J.D. 1968) where he was Editor-in-Chief of the Temple Law Review. He was admitted to the Pennsylvania Bar in 1969. Mr. Barrack served as a Law Clerk to the Delaware Court of Chancery in 1968-1969.

Joseph R. Lally joined the Berger firm in late 1970 and left it in the Fall of 1972 to become Assistant City Solicitor of Philadelphia in charge of antitrust. Mr. Lally was graduated from Saint Joseph College (B.S. 1961) and Villanova Law School (J.D. 1969). Mr. Lally was admitted to the Supreme Court of Pennsylvania in 1969. Prior to joining the Berger firm, Mr. Lally had been the Law Clerk for The Honorable Thomas J. Clary, Senior Judge, United States District Court for the Eastern District of Pennsylvania.

Bruce K. Cohen joined the Berger firm in 1972 upon graduation from law school. Mr. Cohen was graduated from Temple University (A.B. cum laude 1969) and the University of Pennsylvania Law School (J.D. 1972). He was admitted to the Supreme Court of Pennsylvania in 1972.

Howard L. Schambelan was associated with the Cohen, Shapiro, Berger, Polisher & Cohen law firm and joined the Berger firm in 1970. He was graduated from Haverford College (B.A. 1961) and Harvard University Law School (J.D. 1964). He was admitted to the Bar in 1965.

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Joel C. Meredith joined the Berger firm in 1971. He received his preparatory education at the University of Illinois and Roosevelt University (B.S. 1966). He graduated from Villanova University Law School (J.D. 1969) where he was a member of the Board of Editors of the Law Review. Mr. Meredith was admitted to the Supreme Court of Pennsylvania in 1970.

Gerald J. Rodos joined the Berger firm in 1971. He was graduated from Boston University (B.A. 1967) and University of Michigan Law School (J.D. cum lauda 1970). Mr. Rodos was admitted to the Supreme Court of Pennsylvania in 1971. Mr. Rodos is co-author of the Law Review Article, "Standing To Sue of Subsequent Purchasers for Antitrust Violations - The Pass-On Issue Reevaluated" in 20 S.D. L. Rev. 107.

Alan M. Lerner was an associate at Cohen, Shapiro, Berger, Polisher and Cohen and remained there after the formation of the Berger firm. Mr. Lerner is now a partner in the Cohen firm. He has not been involved in this litigation since 1970. Mr. Lerner was graduated from the University of Pennsylvania in 1962 (B.S. in Economics) and from the University of Pennsylvania Law School (LL.B. 1965). He was admitted to practice in New York in 1966 and in Pennsylvania in 1968. During 1967 and 1968 he served as a Law Clerk to The Honorable A. Leon Higginbotham, Jr., United States

District Court for the Eastern District of Pennsylvania.

Merrill G. Davidoff has been associated with David Berger, P.A. since 1973. He was graduated from the Law School of the University of Pennsylvania (J.D. cum laude, 1973) and was admitted to practice in Pennsylvania in 1973.

Barry N. Shaw was admitted to practice in Pennsylvania in 1966. He was graduated from the Law School of Rutgers University in 1965 (LL.B.). Mr. Shaw was associated with Petitioner for the period 1972 to 1973.

Earl D. Greenburg was graduated from the Law School of the University of Pennsylvania (J.D. magna cum laude, 1970) and admitted to practice in Pennsylvania in 1971. He was associated with Petitioner for the Period 1971-1973.

Pauline C. Cohen was graduated from the Law School of Temple University (LL.B. 1965) where she was a member of the Board of Editors of the Temple Law Review. She was admitted to practice in 1966. She was associated part time with Petitioner in 1971 and 1972.

35. Paraprofessional services relating to these proceedings were provided primarily by Sharon L. Thomas, Peter G. Reynolds, Jr. and Emily Samson. Ms. Thomas received a B.S. Degree from Drexel University in 1971 and has been

employed by Petitioner as a paraprofessional from December 1971, to date. Mr. Reynolds received a B.S. from Washington and Lee University in 1962 and has been Office Administrator for Petitioner since August, 1971. In this position he has worked on class administration and distribution in most major class actions handled by Petitioner. Ms. Samson received a B.A. Degree (cum laude) from the University of Pittsburgh (1971) and is a graduate of the Institute for Paralegal Training (1971). She commenced working as a paralegal at Petitioner's firm in January 1972 and continued in that capacity until early 1973 when, because of marriage, she moved to another city.

C. HOURLY RATES OF THE BERGER FIRM

36. In litigation of this kind, Petitioner does not have a "normal billing rate" in the sense of an hourly rate applied to each individual attorney for the hours worked. Normally it is compensated on a contingent basis by a percentage of the recovery. Even where its representation is not completely contingent, a factor is normally included in its compensation predicated on the amount recovered. For example, in Allen Organ Co. v. North American Rockwell Corporation, 363 F.Supp. 1117 (E.D. Pa. 1973), Petitioner represents the plaintiffs under a fee agreement which provides for the monthly payment of fees at the rate of $75 per hour for all personnel, including paraprofessionals, plus a

contingent fee of 25%. One-half of the fees received under the hourly rates are to be credited against the contingent fee. In other instances, Petitioner has entered into similar fee agreements.

In other instances, Petitioner has entered into fee agreements for payment of initial $10,000 retainers plus a success fee based on the results achieved.

37. The hourly rates set forth on Exhibit "I" hereto are the minimum rates which Petitioner would charge for the attorneys listed therein if retained on an hourly basis in an antitrust case, together with a success fee based upon the result. Based upon my knowledge of hourly rates charged by members of the antitrust bar in major urban areas, the rates set forth on Exhibit "I" are reasonable minimum hourly rates for the attorneys listed therein for the period involved in this litigation for work on routine antitrust matters, regularly and currently billed without reference to contingency, success, the quality of work or other facts which may properly be taken into consideration. */ Moreover, the charge of a substantial additional fee based upon a successful result, in addition to such minimum rates, is likewise common practice, even among defense firms where there is no contingency involved. For example, see Exhibit "J" annexed hereto which is a true and correct copy of the complaint in Simpson, Thacher & Bartlett

*/ In the IHOP fee award, supra, Messrs, Montague, and Newberg were assigned an hourly rate of $100.

v. Occidental Petroleum Corp., Civl Action No. 74 Civ. (S.D.N.Y. filed February 15, 1974, wherein defense counsel alleged that it contracted for a success fee in the amount of $1,500,000 in addition to its hourly fee which was paid currently by the client. Disbursements were also paid currently.

38 (a) The Lindy Bros. */ litigation was commenced almost two years prior to the three National Class Actions sub judice (October, 1966 versus July, 1968).

(b) A substantially greater percentage of Messrs. Montague's and Newberg's time in Lindy Bros. was expended prior to the formation of David Berger, P.A. (through September, 1970) as compared to the Grinnell class actions. The following charts demonstrate this:

	LINDY BROS.	GRINNELL
H. B. NEWBERG:		
(i) Hours through 9/70	627.5 hours	146.5 hours
(ii) Total Allowable Hours:	962.9 hours	697.5 hours
(iii) Per Centage of Hours BEFORE formation of David Berger, P.A.	65%	21%
(iv, Per Centage of Hours AFTER formation of David Berger, P.A.	35%	79%
H. L. MONTAGUE, JR.		
(i) Hours through 9/70:	100.63 hours	225.3 hours
(ii) Total Allowable Hours	183.68 hours	1585.5 hours
(iii) Per Centage of Hours BEFORE formation of David Berger, P.A.	54.8%	14.2%
(iv) Per Centage of Hours AFTER formation of David Berger, P.A.	45.2%	85.8%

*/ Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 382 F. Supp. 999 (E.D. Pa. 1974).

39. During the year 1974, based upon an average paralegal salary of $11,000 per year, it was estimated that the total cost to Petitioner to employ a paralegal was in excess of $9.00 an hour. The prevailing rate charged to clients for paraprofessionals' services undertaken on a non-contingent basis is $25. per hour.

40. (a) Petitioner generally accepts representation in class action litigation on a contingency fee basis. Accordingly, in order to recover a fee, plaintiff must be successful in the prosecution of the suit, obtaining a benefit for his clients and the class. A large portion of Petitioner's practice is comprised of class action and contingent fee litigation.

(b) All class action or antitrust suits are not successful. In contingent fee cases where the class action suit is not successful, petitioner does not receive any compensation whatsoever for the hours expended in rendering legal services;

(c) Petitioner has commenced and prosecuted some class action complaints which were not settled and which were dismissed after substantial pretrial, but before trial. For example, in the cases captioned In re Motor Vehicle Pollution Control Devices, M.D.L. Docket No. 31 (C.D. Cal.), petitioner expended approximately 2000 hours prosecuting a nationwide class action, including the class action issues, extensive review of documents, conducting extensive depositions, presenting oral arguments in the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit, and in the preparation and filing of a Petition for Certiorari in the United States Supreme Court. On the eve of trial, the

case was dismissed on the ground that the district court did not have the power to grant the equitable relief sought by plaintiffs. Accordingly, the petitioner received no compensation for the hours of legal services rendered;

(d) More recently, in In Re Transit Company Tire Antitrust Litigation, M.D.L. Docket No. 111 (W.D. Mo.), plaintiff expended approximately 2000 attorney hours in discovery and in the briefing, trial and argument of the nationwide class action issue. The court ultimately denied the class action. Accordingly, petitioner may not be compensated for those hours expended;

(e) The Air Pollution case followed a Government Civil Action, U.S. v. Automobile Manufacturers Association, Civ. No. 69-75-JWC (C.D. Cal.) which ended in a consent decree. 307 F.Supp. 617 (C.D. Cal. 1969). The Transit Company Tire case followed a Federal Trade Commission Complaint, In the matter of Goodyear Tire and Rubber Co., et. al. Docket Nos. 671-007-0011, which also ended with the entry of a consent decree;

(f) Accordingly, the risks involved in the prosecution of class action cases are substantial, both as to the merits of the case and as to the certification of the class or classes. The commencement of a class action antitrust suit does not insure success to plaintiff's counsel, even where a prior Government suit was filed;

(g) Plaintiff's counsel, like Petitioner, must rely on fee awards in successful cases to compensate them for the risks they assumed in the unsuccessful cases.

D. BERGER FIRM'S FEE CONTRACTS WITH CLIENTS

41. All of Petitioner's contracts with its clients in these actions were fully contingent in nature and completely dependent upon a successful recovery. Petitioner has never received any fees or reimbursement for services from any client or the Court for any services throughout the more than six years during which Petitioner has been active in these actions. */

42. Petitioner has fee contracts with 21 approved claimants to the settlement fund with total valid transactions in the amount of $1,101,371.80. The total recovery paid or still due Petitioner's individual clients from the settlement fund approximates $44,054.87. (based upon a 4% recovery)

43. Petitioner's fee contracts with its clients provide for payment of contingent fees in the amount of 25% of the recovery, except in one instance, of 40%. **/ In order that litigation expenses be equitably shared by all class members, Petitioner has agreed to charge each of its clients who contracted to pay a fee only that percentage of their approved claim which corresponds to the equivalent amount that the Court may award from the approved claims of other class members as counsel fees.

*/ Petitioner, throughout this litigation, did not receive any reimbursement from its clients for out-of-pocket expenses advanced by it. Petitioner received reimbursement for out-of-pocket expenses for the first time, in December ,1974, pursuant to a Court Order allowing payment of costs from the Settlement Fund.

**/ Were Petitioner to enforce its fee contracts, Petitioner would receive total fees from its clients in the amount of $12,922.35.

E. STATUS OF THE SETTLEMENT FUND

44. A Final Judgment was entered on January 23, 1973 approving the settlement and incorporating the settlement agreement under which Petitioner was to continue to administer the settlement and represent the classes for challenge purposes. A small group of claimants, represented by one firm, filed a Notice of Appeal from the determination that the settlement was reasonable. However, because of the terms of the settlement, the principal sum of $10,000,000 began earning interest as of January 23, 1973 at the rate of one point above the prime rate as it existed from time to time at the Chase Manhattan Bank, New York, N.Y.

45. A Final Judgment on the attorneys' fees was entered January 26, 1973. It awarded $1.5 million, plus disbursements to April 20, 1972 of $14,918, to Petitioner and retained jurisdiction for purposes of determing whether four other petitioning firms were entitled to share in this fee.

46. One law firm representing a number of claimants filed a Notice of Appeal from the Judgment of January 26, 1973. The same firm did not appeal the Judgment of January 23, 1973.

47. Petitioner alone represented the national classes on the appeal from the Final Judgment of January 23, 1973 approving the settlement. Petitioner alone filed briefs

and orally argued for the national classes on the appeal from this Judgment in the United States Court of Appeals for the Second Circuit.

48. On March 13, 1974 the United States Court of Appeals for the Second Circuit affirmed the Judgment of January 23, 1973 approving the settlement and reversed and remanded for further hearings the Judgment of January 26, 1973 awarding counsel fees to Petitioner. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). In affirming the District Court's approval of the Settlement, the Court of Appeals found that the Settlement "...was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced." 495 F.2d at 458.

49. Pursuant to Settlement Order No. 3, dated September 30, 1974, the Class Action Committee, designated pursuant to Settlement Order No. 1, was terminated and Petitioner alone was given full responsibility for all further class action administration, including control over investment and disbursement of settlment funds and resolution of all outstanding challenges to claims. Since September 30, 1974 Petitioner has undertaken all responsibility for all class action administration.

50. Pursuant to Settlement Order No. 3, a hearing was held on November 25, 1974 on all outstanding challenges to claims. Petitioner alone represented the class at such

hearing. As a result of Petitioner's briefs and oral argument, one claim with transactions in excess of $9 million was disallowed, thus increasing the individual recovery of each proper class member.

51. By Order of December 10, 1974, the District Court awarded David Berger, P.A., $41,122.69 to be paid out of the settlement and for reimbursement of out-of-pocket expenses incurred through October 31, 1974, in the prosecution of these class actions and in obtaining approval or and in administering the settlement.

52. (a) As of October 23, 1975, defendants have paid over to Petitioner, in escrow pursuant to Settlement Order No. 3, the principal sum of $9,025,000. From January 23, 1973 (Date of Final Judgment) to the date of payment by defendants of each installment, that principal sum had earned interest at one point above prime in the amount of $1,678,434.63. Additional interest has been earned to date in the approximate amount of $363,400.

(b) As of October 23, 1975, $975,000 of the Settlement Fund principal remains unpaid by defendants Holmes and AFA. It is estimated that under the terms of the Settlement Agreement, the interest earned on this unpaid portion of the Settlement Fund as of October 23, 1975, will equal or exceed $223,650;

(c) Accordingly, as a result of the provisions of the Settlement Agreement, the total interest earned on the $10,000,000 principal Settlement Fund will equal or exceed

$2,200,000, causing the gross Settlement Fund ultimately to exceed $12,000,000;

(d) On March 31, 1975, 13,172 checks were distributed to claimants in the amount of $9,357,777.14. This represented the first of two distributions to the claimants. No deductions for attorneys' fees were made from this first distribution.

H. L. L. Montague Jr.

H. LADDIE MONTAGUE, JR.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 28th DAY
OF October ,1975

Marie R. Russo

NOTARY PUBLIC

MARIE R. RUSSO
Notary Public, Philadelphia Co.
My Commission Expires June 13, 1977

BURGLAR ALARMS - TIME

DAVID BERGER

DATE	DESCRIPTION	HOURS
1968		
AUGUST		
5	Court Appearance (E.D.Pa.) and preparation	3.0
DECEMBER		
6	Conference in Chicago	5.0
1970		
FEBRUARY		
16	Conference in New York City with H.B.Newberg and Mr. Flinn re: settlement and preparation	4.0
23	Conference in New York City	1.0
MARCH		
26 (Week of)	Summary Judgment Argument in Second Circuit and preparation	20.0
26	Conference with H.B.Newberg and Mr. Flinn in New York City re: settlement negotiations (following 2d Circuit Argument); preparation	3.0
APRIL		
21	Discovery conference with H.B.Newberg and H.L.Montague	1.0
24	Pre-trial conference with H.B.Newberg and H.L.Montague	1.0

EXHIBIT "A"

DAVID BERGER

DATE	DESCRIPTION	HOURS
1970		
MAY		
3	Conference, hearing and preparation	4.0
JUNE		
23	Conference, New York City	4.0
NOVEMBER		
19	Conference with defense counsel, New York City re: settlement	4.0
1971		
JANUARY		
4	Conference with ADT, Counsel D.Berger, Messrs. Goldberg & Specks, New York City, re: settlement	4.0
11	Conference - D.Berger, H.L. Montague and H.B.Newberg	0.5
21	Conference - D.Berger, H.L. Montague and H.B.Newberg	0.3
JUNE		
18 (Week of)	Class action argument and preparation	20.0
30	H.L.Montague, Settlement conference with all defense counsel, New York City; and preparation	7.5
JULY		
8	H.L.Montague, Settlement conference with all defense counsel, New York City; and preparation	9.0

DAVID BERGER

DATE	DESCRIPTION	HOURS
1971		
AUGUST		
17	Settlement conference with all defense counsel; and preparation	10.0
NOVEMBER		
24	Hearing on approval of Settlement Order No. 1 and Notice to Class; and preparation	8.0
1972		
FEBRUARY		
16	Class action committee meeting	8.0
29	Class action committee meeting	4.0
MARCH		
3	Court appearance re: Objector's Motion to compel discovery and preparation	14.5

BURGLAR ALARMS - TIME

DAVID BERGER

DATE		DESCRIPTION	HOURS
1972	APRIL		
5		Conference, H. Laddie Montague	1.0
6		Review of File	1.0
	MAY		
11		Settlement - Review	2.0
12		Settlement - Review of File	2.0
14		Settlement Justification - Review Correspondence	4.0
16		Conference, H. Laddie Montague	1.5
18		Conference, H. Laddie Montague	2.5
19		Conference, H. Laddie Montague	2.0
20		Review of File	3.0
21		Review of File	4.0
22		Review and Preparation for Court	5.0
23		Conference, H. Laddie Montague	7.0
24		Travel to NY, preparation for Court, Court	10.5
25		Hearing, Meetings	8.5
26		Preparation for Challenge	1.5
30		Call to Spivak	1.0

DAVID BERGER
(Continued)

DATE	DESCRIPTION	HOURS
1972		
JUNE		
5	Court	9.0
7	Phone - McDonald Flynn	0.5
9	Phone - Mr. Constobile	1.0
1973		
JANUARY		
2	Calls, McInnery, Joslan, Spivack	1.5
9	Call, Brislin, Spivack	1.0
15	Call, Spivack	1.0
16	Conference, Brislin, H. Laddie Montague, Jr.	1.0
17	Conference, H. Laddie Montague, Jr., Brislin	2.0
22	New York Conference, J.Metzner	4.0
24	Call to Brislin, Review of File	1.0
25	Call, Spivack, conference, H. Laddie Montague, Jr.	1.0
FEBRUARY		
15	Call, Spivack	1.0
22	Conference, H. Laddie Montague, Jr. Calls to Holman, Spivack	1.0
MARCH		
1	Call, Brislin	1.0
2	Call, Brislin	1.0
14	Call, Brislin	1.0

DAVID BERGER
(Continued)

DATE 1973	DESCRIPTION	HOURS
MAY		
2	Call, Joslan re: Appeal	0.5
4	Conference, H.L.Montague, prepare brief	3.0
7	Prepare brief	5.0
8	Prepare brief	4.0
9	Conference, H.L.Montague, Call to Spivack	4.0
10	Travel to NY, meetings	11.0
11	Conference, H.L.Montague, Brief	4.0
12	Preparation of brief	6.0
13	Preparation of brief	6.0
14	Preparation of brief	4.0
15	Preparation of brief, conference, H.L.Montague	5.0
17	Preparation of brief	3.0
25	Conference with H.L.Montague; Call to Spivack	1.0
OCTOBER		
18	Preparation for Argument	3.0
19	Preparation for Argument; conference, H.L.Montague	2.0
24	Preparation for Argument; conference, H.L.Montague	6.0
25	Conference, H.L.Montague, Call to Brislin	3.0
26	NY - conference, H.L.Montague and Brislin	8.0

DAVID BERGER
(Continued)

DATE	DESCRIPTION	HOURS
1973		
OCTOBER		
27	Preparation for Argument	3.0
28	Preparation for Argument	10.0
29	New York: Argument	10.0
NOVEMBER		
7	Conference, H.L.Montague; Call to Brislin	1.0
8	Call Brislin	1.0
13	Call Brislin	1.0
19	Calls Brislin	1.0
DECEMBER		
6	Conference, H.L.Montague; Calls to Brislin, Fusaro	1.0
1974		
FEBRUARY		
4		.25
MARCH		
11	Conference, Spivack, H.L. Montague, Letter to C & Z	1.0
14	Settlement Claims Proceeding; Conference, H.Berger, Conference, P.Reynolds and ST	2.25 1.0
15	Call to Brislin Procedure - H.Berger, H.L. Montague, Frey, D.Berger	3.0
15	Conference, H.L.Montague	.50
15	Conference, H.Berger	1.0

DAVID BERGER
(Continued)

DATE 1974	DESCRIPTION	HOURS
MARCH		
18	Conference, H. Laddie Montague	1.0
19	Conference, H. Laddie Montague	1.0
29	Review procedures for Challenge Claims	1.0
APRIL		
1	Settlement procedures	1.0
MAY		
15	Conference Call Spivack re Settlement Fee	.5
JUNE		
18	Call; preparation re Settlement order	1.0
JULY		
8	Conference Judge Berger, Tom Brislin, H. Laddie Montague, Jr. re preparing orders, etc.	2.0
11	Pre-trial order, etc.	2.0
12	Conference Judge Berger, Frey, H. Laddie Montague, Jr.; Telephone Calls Brislin review order	2.5
17	Conference Tom Brislin Distribution Settlement Order	1.0
18	Settlement conference re Distribution, H. Berger, D. Frey	2.0
19	Review documents re Settlement	1.0

DAVID BERGER
(Continued)

DATE 1974	DESCRIPTION	HOURS
JULY		
21	Settlement conference, H.L.Montague, H.Berger	1.0
AUGUST		
7	Conference, H.L.Montague re: settlement review of documents	3.0
SEPTEMBER		
24	Conference, H.L.Montague review documents; conference Judge Metzner	3.0
25	Preparation	8.0
26	Preparation for conference on Sept. 27, 1974, review documents, etc.	2.0
27	Conference, G.Spivack, telephone calls to Messrs. McInnery Flynn, et al. Hearing Metzner, J.	10.0
29	Conference, H.L.Montague, preparation and review order Conference, S.Segal, J.Heffler re: trust funds, etc. review of documents	3.0
30	(See memo in file)	10.0
OCTOBER		
4	Investments discuss Moffett	1.0
NOVEMBER		
11	Review memo re: Nov. 25, 1974 hearing	1.0
12	Discussion, S.Segal; conference PNB, discussion J.Metzner's law clerk Jones, review all investments. Decisions re: investments of settlement funds	3.0

DAVID BERGER
(Conference)

DATE	DESCRIPTION	HOURS
1974 NOVEMBER		
13	Investments Order #3 Conference Metzner, NY	7.0
14	Discussion H. Laddie Montague re: distribution, etc.	1.0
20	Discussion H. Laddie Montague re: hours conference M. Shapiro review documents re: challenged claims re: Nov. 25, 1975	1.0
24	Preparation for Hearing re: Challenged claims	3.0
25	Hearing - Special Master Shapiro re: challenged claims including AFA	8.0
1975		
FEBRUARY		
7	Discuss H. Laddie Montague and PR; call to bank	1.5
12	Conference H. Laddie Montague re: distribution various problems -- investments Escrow funds	2.0
12	Discussion G. Spivack, H. Laddie Montague	1.0
13	Deliver status report to Judge Metzner; trip back to Phila.	2.5
14	Distribution Escrow account	2.0
MARCH		
10	Preparation for distribution March 31; Conference H.L. Montague, Pete Reynolds re: Preparation for distribution	2.0

DAVID BERGER
(Continued)

DATE		DESCRIPTION	HOURS
1975	MARCH		
12		Call Special Master re: schedule to order, etc., discussion	1.0
19		Print outs re: Special Master Report, discussion Pete Reynolds	1.0
21		Hearing March 25, Motion for Distribution	1.5
	APRIL		
7		Review problems re: distribution	1.0
9		Problems concerning first distribution	1.0
10		Review first distribution, report Judge Metzner, coordination remaining problems out of first distribution	1.0
	MAY		
5		H.L.Montague and Peter Reynolds Review distribution problems	1.0
14		Conference H.L.Montague and P.Reynolds re: distribution of proceeds computer, etc.	1.0
	JUNE		
17		Conference, H.L.Montague and P.Reynolds, review figures re: distribution	1.0
	JULY		
14		Review J.Heffler report re: compilation errors,discussion H.L.Montague, Jr.	1.0

BURGLAR ALARMS - TIME

H. LADDIE MONTAGUE, JR.

DATE	DESCRIPTION	HOURS
1968		
JULY		
10	Pre-trial Discovery. Preparation File Pleadings	5.5
11	Pre-trial other. Preparation File Pleadings	0.5
19	Litigation advice to client. Telephone.	0.3
22	Pre-trial other. Preparation documents	1.5
22	Pre-trial other. Telephone	0.3
22	Pre-trial other. Review documents	1.5
25	Pre-trial Discovery. Preparation and filing of interrogatories	1.0
26	Pre-trial other. Preparation File Motions	0.5
26	Pre-trial other. Appear Court Argument	1.0
1969		
APRIL		
28	Pre-trial discovery. Telephone	4.0
MAY		
29	Pre-trial other. Research investigation.	5.0

EXHIBIT "B"

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1969	DESCRIPTION	HOURS
JUNE		
2	Pre-trial discovery. Conference staff.	0.3
4	Pre-trial other. File review	0.7
5	Pre-trial conference with plaintiffs'	8.7
6	Pre-trial other. Preparation file motions	0.3
9	Pre-trial other. Telephone	0.3
13	Pre-trial other. Preparation hearing	1.0
16	Pre-trial other. Conference other.	7.8
17	Pre-trial other. Appear Court Argument	7.0
19	Pre-trial other. Telephone	0.5
24	Pre-trial other.	0.5
24	Pre-trial other. Telephone	0.5
25	Pre-trial discovery. Research investigation	1.0
25	Pre-trial discovery. Conference other.	8.7
26	Pre-trial other. Research investigation.	2.0
27	Pre-trial other. Research investigation	1.5
27	Pre-trial other. Research investigation	2.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1969	DESCRIPTION	HOURS
JUNE		
30	Pre-trial other. Research investigation	4.3
JULY		
1	Pre-trial other. Preparation file briefs	5.5
2	Pre-trial other. Preparation file briefs	3.9
3	Pre-trial other. Preparation file briefs	3.0
8	Pre-trial other. Conference staff	0.4
10	Pre-trial other. Preparation file briefs	4.3
11	Pre-trial other. Research investigation	3.0
14	Pre-trial other. Research investigation	5.3
16	Pre-trial other. Preparation file briefs. Contra summary judgment	6.0
17	Pre-trial other. Preparation file briefs	7.5
18	Pre-trial other. Preparation file briefs	1.5
21	Pre-trial other. Preparation file briefs	0.5
23	Meeting, NYC, re final draft-summary judgment brief	8.0
SEPTEMBER		
3	Intervention fee agreement. Preparation file pleadings	0.8

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1969	DESCRIPTION	HOURS
DECEMBER		
8	Pre-trial other. File review	1.5
15	Conference of plaintiffs' counsel, New York City	4.0
1970		
JANUARY		
6	Conference, Wash., DC	5.0
13	Pre-trial other. Research investigation	0.4
14	Pre-trial discovery. Review documents	2.3
15	Pre-trial other. File review	0.4
19	Pre-trial other. Review documents	0.6
20	Pre-trial other. Telephone	0.3
21	Pre-trial other. Research investigation	0.5
22	Pre-trial other. Conference other	8.5
26	Pre-trial other. Correspondence	1.0
FEBRUARY		
11	Pre-trial other. Research investigation	1.5
12	Pre-trial other. Research investigation	0.5
13	Pre-trial other. Preparation file form	1.0
13	Pre-trial other. Preparation file form	1.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1970	DESCRIPTION	HOURS
FEBRUARY		
19	Appeal Appellate Court. File review.	1.2
23	Appeal Appellate Court. Preparation file briefs	1.5
24	Pre-trial other. Preparation file briefs	4.4
25	Pre-trial discovery. Preparation file briefs	3.9
26	Pre-trial other. Preparation file briefs	2.2
27	Pre-trial other. Research investigation	0.5
27	Post trial. Preparation file briefs	0.2
MARCH		
2	Pre-trial other. Review documents	0.6
3	Pre-trial other. Conference other. Meeting in New York City re final draft of SOL brief in Second Circuit Court of Appeals	11.5
9	Appeal Appellate Court. Conference argument.	1.0
16	Appeal Appellate Court. Preparation argument	2.0
17	Appeal Appellate Court. Preparation argument	0.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1970	DESCRIPTION	HOURS
JULY		
14	Pre-trial discovery. Preparation file motions	2.0
21	Pre-trial discovery. Conference staff	0.2
21	Pre-trial discovery. Conference other.	7.0
AUGUST		
12	Appeal Appellate Court. Research investigations	3.3
13	Appeal Appellate Court. Research investigation	4.9
14	Appeal Appellate Court. Correspondence	3.0
17	Pre-trial discovery. Preparation file Requtry Report	0.8
17	Appeal Appellate Court. Preparation file briefs	3.0
18	Pre-trial other. Research investigation	0.6
21	Pre-trial other. Research investigation	2.3
21	Pre-trial other. Telephone	0.4
24	Appeal Appellate Court. Conference other.	11.4
27	Pre-trial other. Preparation file briefs	1.0
28	Pre-trial other. Research investigation	1.3
SEPTEMBER		
16	Pre-trial other. Research inves.	0.6
24	Pre-trial discovery. Conference other.	6.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE		DESCRIPTION	HOURS
1970			
	SEPTEMBER		
25		Pre-trial discovery. Preparation file interrogatories	1.6
	OCTOBER		
7			1.0
13		re Drexel; Conference with D. Berger and staff	2.0
14		Pre-trial, other	0.6
30		Staff conference	1.0
	NOVEMBER		
12			0.3
16			1.0
17		re settlement, interventions	1.0
18			5.0
20			3.0
30		Answers to interrogatories Class action	2.0
	DECEMBER		
1		Class action brief	5.5
2		Class action brief	4.75
3		Class action brief	9.75
1971			
	JANUARY		
11		Conference with D. Berger, Herbert B. Newberg	0.5
21		Conference with D. Berger, H.B.Newberg	0.3

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1971	DESCRIPTION	HOURS
FEBRUARY		
18	Inspection of documents New York	7.75
19	Preparation of memo	5.0
21	Preparation of memo	3.5
22	Preparation of memo	7.0
25	Review class action brief of defendant's	1.0
MARCH		
2	Telephone and review class action briefs	2.0
6	Class action	1.0
9	Class action research, etc.	4.5
10	Plaintiff's and Defendant's conference - inspection of documents in New York City	11.0
11	Research re: class	1.0
12		1.5
15	Research	1.0
22	Research	4.25
23	Research	3.0
26	Travel to New York City and inspection of documents	8.0
28	Reply to class action brief	9.5
29	Reply to class action brief	11.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1971	DESCRIPTION	HOURS
MARCH		
30	Class action reply brief and affidavit	12.0
31	Reply brief and affidavit	1.5
APRIL		
27	Conference with Paras re: answer interrogatories	0.5
MAY		
20	Converence with Giffin and Walinsky	1.0
26	Review of records, research	0.75
27	Review of documents - conference with IW	0.75
27	Conference with Paras	0.75
JUNE		
1	Conference with IW	0.5
8	Conference with IW - research	0.5
9	Settlement agreement	6.5
11	Conference with IR	0.5
16	Preparation for class action arguments	3.5
17	Preparation for class action arguments	5.0
18	Class action argument (NYC) and preparation	9.0
30	Settlement meeting in New York City	7.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1971	DESCRIPTION	HOURS
JULY		
8	Meeting in New York City 14 Wall St. re: settlement and travel	9.0
OCTOBER		
4	Settlement papers, telephone	3.0
5	Settlement papers, telephone	1.0
7	Settlement - telephone	0.5
NOVEMBER		
24	Hearing, New York City, re preliminary approval of settlement, Notice, etc.	8.0
DECEMBER		
15	Preparation of proposed orders	1.0
15	Conference with J. Metzner re: Goldberg class action in NYC	7.0
21		1.0
27	Telephone re: inquiries from notice	3.0
28	Class administration - response to letter and phone	2.0
28	Trip to NYC re settlement admin.	6.5
1972		
JANUARY		
3	Telephone calls and correspondence re: class committee	6.0
4	Telephone and correspondence re: class administration	4.5
7	Answering class correspondence	2.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1972	DESCRIPTION	HOURS
JANUARY		
14		2.0
15		2.5
17	re: Class	3.0
18	Class administration	2.25
20	Class committee meeting, affidavit and order	6.0
21	Class action administration Correspondence	3.0
22/23	Class administration	3.0
24	Class action - correspondence, etc. Telephone calls	7.0
25	Class action administration Correspondence and telephone	5.0
26	Class action administration and telephone correspondence	3.0
27	Telephone and correspondence	1.0
31	Class administration	9.0
FEBRUARY		
3		4.0
4	Class administration, telephone, etc.	8.5
5	Class administration	6.25
7		5.0
8		4.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1972	DESCRIPTION	HOURS
FEBRUARY		
9	Class administration, telephone, etc.	7.5
10	Class action administration (Calls, correspondence - brief research, review, claims)	8.0
11	Class action committee meeting (NY) includes transportation and preparation - class action administration Messirov Motion	9.75
14	Class action administration; Kronfeld Motion; Challenges	6.25
15		5.5
16	Class action committee meeting Class action administration	8.0
17	Review of claims, correspondence re: class administration	6.0
18	Class action	6.0
19/20	Kronfeld motion	4.0
21	Kronfeld motion class administration	8.0
22	Research re: Class	6.0
23	Class administration	4.5
24	Class administration	4.0
25	Class action meeting committee review of claims	10.5
26	Class action claims;brief re: Settlement	10.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1972	DESCRIPTION	HOURS
FEBRUARY		
27	Brief re: Settlement	1.0
28	Class action review claims, challenges, etc.	13.5
29	Class action meeting with defendant's counsel	9.25
MARCH		
1		16.5
2	Claim challenges (NY) Argument re: Kronfeld motion	14.5
3	Class committee	5.0
6	Class administration	6.0
7	re: Challenge to claims correspondence, telephone, brief	6,75
8	Class claim correspondence, telephone, etc.	3.25
9	Class administration	10.5
10	Meeting with Miller, Challenge Calls and correspondence	8.5
11/12		6.0
14	Class action	8.75
15		10.75
16	Class administration (class action)	12.0
17		14.0
18/19		12.0
20		11.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1972	DESCRIPTION	HOURS
MARCH		
21		7.5
22	Class administration Telephone and correspondence	3.5
23	Telephone, et al.	1.0
27	Administration of claims, affidavits, telephone	5.5
28	Class action committee meeting in New York City	8.0
29	Class administration	2.5
30	Class administration	2.0
31		2.5
APRIL		
3	Class action administration	2.0
5		2.0
6		1.0
7		3.0
10		4.0
11		1.0
12		3.0
13	Class administration, phone	3.0
14		4.5
16		3.0
17		6.25
18		7.5
19		10.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1972	DESCRIPTION	HOURS
APRIL		
20		8.0
21		4.25
24		3.0
25		3.0
26		2.75
27	Response to class members re: Claims	4.5
28		4.0
MAY		
1	Research - class action administration	5.0
2	re: Settlement	8.5
4		4.75
5	Correspondence, administration Response to motion	4.5
6	re: Settlement	2.0
10	re: Settlement	2.0
11	re: Settlement	6.5
12		11.5
15	Settlement: Approval	8.5
16	Settlement: Approval	8.25
18	Settlement: Approval	8.75
19	Brief re: Settlement - Reply to fees	10.5
20	Settlement and fee	8.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1972	DESCRIPTION	HOURS
MAY		
21	Response to fee	8.0
22	Settlement; with D.Berger Petition for fees	13.5
23	Preparation for argument with D.Berger; Affidavits for class action committee; Motion to Quash Kronfeld Subpoena	10.0
24	Preparation for argument and argument in Court	10.5
25	Settlement Hearing and Rebuttal	8.5
30	re: Fees	1.5
31	Correspondence re: claims	0.25
JUNE		
2	Preparation for fee argument	5.5
4	Preparation for fee argument, travel to New York City	6.5
5	Hearing re: fees - travel to Philadelphia	9.0
6	Administrative	2.5
9	Miscellaneous	1.0
19	Class administration	0.5
20	Class administration, corres.	0.5
22	Class administration, corres.	1.0
27	Correspondence re: Claims	1.0
AUGUST		
2		1.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE	DESCRIPTION	HOURS
1972		
SEPTEMBER		
7	Correspondence	0.25
15	Correspondence	0.5
OCTOBER		
12	Correspondence	0.5
16	Correspondence	0.5
26	Telephone and Correspondence	0.5
31	Correspondence	0.75
NOVEMBER		
16	Correspondence	0.5
1973		
JANUARY		
3	re: Approval of settlement, review of opinion	1.0
4	Approval of settlement and dismissal. Telephone with defendant's counsel	2.0
7	Draft - final judgment	1.0
8	Final judgment - draft, telephone conference.	3.0
9	re: final judgment, telephone and conference	1.0
10	Review defendant's draft of final judgment; telephone	2.0
10	Correspondence to class members	1.0
10	re: Troika fee	1.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1973	DESCRIPTION	HOURS
JANUARY		
12	non-fee	1.0
15	Class Correspondence	0.5
16	Class Correspondence; fee papers re: Troika; Conference with T. Brislin	5.0
18	Class Correspondence and final judgment	3.0
19	Meeting in New York City with Joslyn and McInnery re: Final judgment. Preparation of revised draft	8.5
21	re: final judgment	0.5
22	Travel to New York City from Buffalo, NY; Meeting with J. Metzner. Return to Phila.	6.0
30	Correspondence	0.5
FEBRUARY		
1	Telephone and Correspondence	0.5
7	Correspondence	1.0
22	Correspondence	0.5
MARCH		
19	re: Settlement appeal, designation of record	1.0
22	Meeting in New York City with defense counsel re: Designation of record - re: settlement	10.0
23		1.0
27	re: Counter-designation telephone	1.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1973	DESCRIPTION	HOURS
MARCH		
28	Settlement appeal, counter designation, telephone	1.0
APRIL		
6	re: settlement appeal	1.0
9	re: settlement appeal	1.0
11	re: settlement appeal, correspondence	0.5
17	re: settlement appeal	0.5
19	re: settlement appeal	2.0
25	re: settlement appeal	0.5
30	settlement appeal	0.5
MAY		
1	re: settlement appeal	0.5
6	re: settlement appeal	1.75
7	settlement appeal	1.0
8	settlement appeal	6.75
9	settlement appeal, brief, research	4.0
10	settlement appeal, brief	3.5
11	Brief re: settlement appeal	7.5
12	brief re: settlement appeal	3.5
13	Brief re: settlement appeal	4.0
14	Brief re: settlement appeal	10.25

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1973	DESCRIPTION	HOURS
MAY		
15	Settlement appeal brief	6.75
16	Settlement appeal brief	6.5
17	re: Settlement appeal brief	7.5
JUNE		
11	Review defendant's brief re: settlement	1.0
JULY		
9		0.25
OCTOBER		
19	Preparation for Second Circuit Argument	2.0
22	Preparation for Second Circuit Argument	2.5
23	Preparation for Second Circuit Argument	3.0
24	Preparation for Second Circuit Argument	4.75
25	Preparation for Second Circuit Argument	3.75
26	Preparation for Second Circuit Argument	4.5
28	Preparation for Second Circuit Argument	4.0
29	Argument Second Circuit re: Approval of Settlement	12.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE	DESCRIPTION	HOURS
1973		
NOVEMBER		
1	Correspondence to Class	0.75
26	Telephone Calls to clients re: Second Circuit Panel	1.0
27	Telephone calls re: Second Circuit Panel disqual.	1.0
DECEMBER		
3	re: Stipulation/Waiver	0.5
17	Second Circuit Argument - Supermarkets General Appeal	8.0
1974		
MARCH		
7	Correspondence	0.5
11	Fee Appeal Response to Simon Letter	0.75
14	Review of Second Circuit Decision; Conference with D. Berger	2.0
15	Procedure for handling claims, conference with D. Berger; review of Second Cir. Decision	3.5
18	Fee conference with D. Berger; Research and review fee	1.5
19	Fee: telephone, research	2.0
20	Draft status report in response to class inquiries	0.75
21	Office; review petition re-hearing re: fee	1.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1974	DESCRIPTION	HOURS
MARCH		
22	Office; review petition rehearing on telephone with D. Marks. of Lord, Day & Lord; telephone with D.Berger	2.0
24	Office; re: petition for rehearing fees	1.0
25	re: settlement telephone with Kronfeld	0.25
26	Petition for costs from Aldon Industries	1.0
28	Correspondence to class administration of claims	0.5
APRIL		
25	Class correspondence	0.5
26	re: fee	0.25
MAY		
1	re: correspondence class members	0.5
13	File review	0.25
22	Form letter to claimants; Conference with Sharon Thomas	1.0
JUNE		
7	re: fee remand--review Brislin memo	0.5
10	re: fee remand--review Brislin memo	1.0
11	Correspondence, etc.	0.75

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1974	DESCRIPTION	HOURS
JUNE		
13	Telephone correspondence	0.5
20	Review challenges	1.5
24	Review of challenges	0.5
25	Fee	0.25
25	Correspondence re: claims	0.75
JULY		
3	re: Settlement Order #3	0.5
5	Drafting of settlement order #3	1.0
8	re: settlement Order #3	0.25
9	Telephone with Brislin re: settlement order #3	0.5
10	Conference with D.Berger re: Settlement Order #3	0.5
10	re: fee remand--legal research	0.5
12	re: settlement conference with D.Berger, etc. Telephone to Defendant's counsel review of settlement order #3	1.5
14	re: Settlement order #3 and Correspondence	0.5
18	re: Notice to challenge and claimants draft, review,conference P. Bagley of Computer Co.	4.0
19	re: Notice	1.5
22	Notice and computer co-ordination	1.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1974	DESCRIPTION	HOURS
JULY		
24	re: Computer print out	0.25
25	Settlement claims administration	1.0
25	Fee matters re: itemization of time (hrs.)	2.5
26	re: Settlement Order No. 3 and notice	1.0
26	re: fee remand -- time records	4.5
29	re: class administration	1.0
31	re: class administration telephone, Judge's Secretary memo	0.5
SEPTEMBER		
19	Conference with Sharon Thomas and Pete Reynolds	0.25
20	Preparation for conference with Judge Metzner	2.0
23	Conference with PR and ST re: challenged claims preparation for 9/27/74 conf.	3.0
24	Conference with D.Berger re: settlement distribution, telephone with Tom Brislin (1/4) settlement Order #3 revision	1.25
25	re: Settlement Order #3 telephone with Flynn, Brislin	1.0
27	Preparation for conference before Judge Metzner, conf. with J.Metzner, travel to and from New York	10.0
29	Revise settlement order no. 3	1.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1974	DESCRIPTION	HOURS
	OCTOBER	
1	re: settlement investment telephone	0.5
7	re: administration	0.25
11	re: class notice conference with PJR and ST re: settlement check and notes from Grinnell	1.5
14	Review	0.5
16	Review printout for notice	1.0
17	re: notice	0.25
21	Notice to class and telephone	1.0
22	Affidavit -- telephone calls	2.0
23	Calls from class members; conf. with PR	1.5
25	Affidavit and telephone calls	1.0
28	Class administration 1) calls; 2) corresp.	1.0
29	Telephone class administration	1.0
31	Class administration, calls Conference with PR	1.0
	NOVEMBER	
1	Telephone and research	3.0
4	Telephone re: claims	3.0
5	Memo for master re: challenges calls re: claims	3.75
6	Memo for Master re: challenges Telephone re: claims	3.0
8	Telephone -- Memo	1.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1974	DESCRIPTION	HOURS
NOVEMBER		
11	Correspondence memo	1.5
12	re:. class administration	2.0
13	re: class administration, telephone, correspondence	4.0
14	Telephone, preparation of documents	1.0
15	Claim administration	2.0
18	re: class administration telephone and correspondence memo re: claims	4.0
19	Telephone with claimants; Preparation for hearing	9.25
20	Travel to NYC re: conference with M.Shapiro, Master (2) visit J. Metzner's Chambers re: costs application (3) re: claims hearing (4) correspondence and telephone (5) brief contra AFA claim	9.5
21	Brief re: AFA claim admin.	8.0
22	Telephone with AFA, telephone re: claimants Bordon, NBC Brief re: AFA challenge, report on challenges, preparation for hearing	7.0
23	Brief and report for hearing 11/25/74	6.0
24	Preparation of documents for hearing (11/25) Preparation for hearing	7.25
25	Travel to NY for hearing re: challenges to claims before Special Master	5.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE	DESCRIPTION	HOURS
1974		
NOVEMBER		
27	Correspondence, telephone	0.5
DECEMBER		
2	Administration	1.5
4	Correspondence	0.5
9	re: correspondence	0.25
12	re: correspondence	0.5
1975		
JANUARY		
9	Correspondence, investment of settlement fund	0.5
28	Affidavit re: 2nd Notice to Lost claimants	0.75
29	Correspondence	0.25
FEBRUARY		
7	Conference with D.Berger re: distribution	1.0
12	Fee statement of facts	3.5
12	Class administration, corres. conf. with D.Berger (1/2)	1.5
13	Administration, visit to Judge Metzner's chambers delivery of letter. Travel back to Phila. Telephone with Special Master	2.5
20	Telephone with Special Master Conference with P.Reynolds, Affidavit and correspondence	1.0
MARCH		
21	re: 1st distribution, conf.	2.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1975	DESCRIPTION	HOURS
MARCH		
22	Draft, certification and motion	2.5
APRIL		
24	Conference with P.Reynolds	1.0
25	Correspondence, conference with P.Reynolds	0.75
MAY		
5	Administration	1.0
7	Administration motion to pay expenses	1.5
8	Administration correspondence	1.5
14	Administration	1.0
27	Correspondence, etc.	0.75
28	Motion re: costs and order and correspondence	1.25
JUNE		
2	re: costs order and motion	0.25
3	Correspondence - telephone	1.5
3	Fee - statement of facts	1.5
4	re: fee hearing;statement/ facts	1.5
4	Class correspondence	0.75
5	Fees-- statement/facts	1.0
6	re: fee hearing;statement/ facts	3.5
6	Correspondence to class	1.0

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1975	DESCRIPTION	HOURS
JUNE		
9	re: fee - time records and statement/facts	6.25
10	Class administration - correspondence	1.0
10	Fee review documents	0.5
11	Class administration Correspondence	0.5
17	Class administration Conference with D.Berger and P.Reynolds	1.0
23	Correspondence class admin.	0.75
26	Review fee statement of facts	2.5
27	Fee re: statement of facts	2.75
27	Class administration conf. with B.Fox, telephone with Mead Corp.	1.5
30	Fee Petition, Statement of facts, time records	6.25
JULY		
7	Administration re: NY Claims Correspondence	1.0
7	Statement/facts - fee	1.5
8	Statement/facts - fee	1.0
8	Administration correspondence	0.5
9	Class administration;conf. with P.Reynolds	0.5
14	Administration - correspondence Telephone with McGaney	0.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1975	DESCRIPTION	HOURS
JULY		
15	Administration	0.5
16	Administration	1.0
16	Telephone T.Brislin conf. P.Reynolds	0.5
17	re: statement facts (fee) Telephone Tom Brislin; conf. D.Berger	1.5
17	Administration - correspondence	0.5
22	re: Fees statement/facts	1.0
22	Administration - correspondence	0.25
24	Fee corres. and statement of facts	0.5
AUGUST		
4	Fee review statement/facts, telephone Brislin	1.0
7	Fee telephone - T.Brislin	0.25
7	Telephone Labosky; corres. re: administration	0.25
8	Fee revise statement of facts re: time	2.5
12	Fee telephone with G.Spivack memo to D.Berger	0.5
20	Class administration - conf. with P.Reynolds re: amend distribution order	3.0
SEPTEMBER		
25	Fee telephone T.Brislin - Conference, D.Berger	0.5

H. LADDIE MONTAGUE, JR.
(Continued)

DATE 1975	DESCRIPTION	HOURS
SEPTEMBER		
25	Fee legal research	0.75
29	Fee remand preparation of affidavit (evidence)	1.5
30	Fee remand - affidavit	4.0
OCTOBER		
3	Fee remand - re: affidavit	2.5
6	Fee remand - Affidavit re: time	5.75
7	Fee remand - Preparation of affidavits; Preparation for hearing	2.5
8	Fee remand - preparation of evidence (time records)	7.0
9	Fee remand - Preparation for hearing, correspondence	1.75

BURGLAR ALARMS - TIME

HERBERT B. NEWBERG

DATE	DESCRIPTION	HOURS
1968		
JULY		
10	Pre-trial other. Preparation file pleadings	7.0
11	Pre-trial other. Preparation file pleadings	3.0
12	Pre-trial other. Preparation file pleadings	3.0
15	Pre-trial other. Preparation file pleadings	1.0
16	Pre-trial discovery. Preparation file interrogatories	1.0
19	Pre-trial other. Preparation file pleadings	2.0
20	Pre-trial. Preparation documents	1.0
29	Pre-trial other. Conference staff	0.5
AUGUST		
8	Pre-trial other. Appear Court Argument	3.0
16	Pre-trial discovery. Preparation of documents	1.0
24	Pre-trial conference, D.Berger	1.0

EXHIBIT "C-1"

HERBERT B. NEWBERG
(Continued)

DATE	DESCRIPTION	HOURS
1969		
APRIL		
15	Pre-trial other. File review	2.0
16	Pre-trial other. Conference other. NY conference among plaintiff's counsel	6.0
MAY		
1	Pre-trial other. Preparation documents	2.0
10	Pre-trial other. Preparation documents - Rule 34 motion	2.0
13	Pre-trial other. Preparation documents	2.0
14	Pre-trial other. Conference in New York among plaintiff's counsel	5.0
15	Pre-trial other. Preparation documents	2.0
21	Pre-trial other. Revisions of Rule 34 Motion	3.0
27	Pre-trial discovery. Rule 34 motion	1.0
28	Pre-trial discovery. Preparation file motions	1.5
JUNE		
2	Pre-trial other. Preparation file briefs	2.0
5	Pre-trial other. Conference with attorneys in New York	3.0

HERBERT B. NEWBERG
(Continued)

DATE 1969	DESCRIPTION	HOURS
JUNE		
6	Pre-trial other. Preparation documents	2.0
9	Pre-trial other. Preparation file briefs	2.0
10	Pre-trial other. Preparation documents	1.0
11	Pre-trial other. Preparation documents	1.0
23	Pre-trial other. Conference with H. L. Montague, Jr. and A.M.L.	1.0
JULY		
5	Pre-trial other. Preparation file briefs	2.0
9	Pre-trial discovery. Conference other	4.0
10	Pre-trial other. Preparation file interrogatories	1.0
16	Pre-trial other. Preparation file briefs	1.0
17	Pre-trial other. Preparation file briefs	2.0
22	Pre-trial discovery. Preparation file briefs	1.0
30	Pre-trial other. Preparation file briefs	1.0
AUGUST		
1	Pre-trial other. New York City conference re: drafting of S/L Brief	6.0

HERBERT B. NEWBERG
(Continued)

DATE 1969	DESCRIPTION	HOURS
NOVEMBER		
12	Pre-trial other. Review documents	1.0
1970		
FEBRUARY		
11	Pre-trial other. Conference with H. L. Montague, Jr. re: brief on appeal S/L	1.0
12	Pre-trial other. Preparation file briefs	1.5
13	Pre-trial other. File review	1.0
16	Settlement conference with all defendants - New York City	4.0
20	Pre-trial other. Review of Appellate brief - Statute of Limitations	2.0
23	Pre-trial conference with D.Berger	1.0
24	Pre-trial other. Preparation file briefs	1.0
MARCH		
6	Pre-trial other. Preparation file briefs	1.5
23	Pre-trial other. Preparation argument re: S/L	1.5
24	Pre-trial other. Conference with D.Berger	1.0

HERBERT B. NEWBERG
(Continued)

DATE 1970	DESCRIPTION	HOURS
MARCH		
25	Pre-trial other. Preparation argument	2.0
26	Documents; argument re: S/L - Second Circuit New York City. Also settlement conference with defendants	4.0
27	Pre-trial other. Review	1.5
APRIL		
8	Pre-trial other. File review	2.0
14	Pre-trial other. Review documents	1.0
15	Review pre-trial conference for April 17, 1970	1.0
16	Pre-trial discovery. Preparation for pre-trial conference re: rediscovery on April 17	1.0
21	Pre-trial discovery. Conference with D.Berger and H.L.Montague	1.0
24	Pre-trial other. Conference with D.Berger and H.L.Montague	1.0
MAY		
7	Pre-trial other. Preparation documents	1.0
12	Pre-trial other. Preparation documents	1.0
JULY		
10	Pre-trial discovery. Review documents	2.0

HERBERT B. NEWBERG
(Continued)

DATE 1970	DESCRIPTION	HOURS
SEPTEMBER		
12	Pre-trial other. Correspondence	2.0
OCTOBER		
12	Pre-trial other. Inspection of documents for production	2.0
15	Pre-trial other. Conference other with Robinson in New York	2.0

BURGLAR ALARMS - TIME

HERBERT B. NEWBERG

DATE	DESCRIPTION	HOURS
1972		
APRIL		
5	Telephone calls, correspondence	1.0
6	Conference with H. Laddie Montague, Jr.	1.0
10	Conference with H. Laddie Montague, JR.	0.5
12	Correspondence, Telephone calls	2.0

COHEN, SHAPIRO, BERGER, POLISHER AND COHEN

CLIENT NO 03-03960 CLIENT NAME BURGLAR ALARM DATE OCT 31 1970

FILE NO	FILE NAME AND LAWYER NAME	ATTY NO	PRIOR HOURS	CURRENT MONTH HOURS	SERVICE PERFORMED CODE	SERVICE PERFORMED DESCRIPTION	TOTAL HOURS
0010	RE GENERAL						
	DAVID BERGER	03					
	LAWYER TOTAL	03	2.00	.00			2.00
					2088	MISCELLANEOUS	
	ALAN LERNER	41		.50	17	RESEARCH INVESTIGATN	
	LAWYER TOTAL	41	23.00	.50			23.50
					2041	PRE-TRIAL DISCOVERY	
	H LADDIE MONTAGUE	45		6.00	09	CONFERENCE OTHER	
		45		1.60	16	PREP FILE INTRG ANS	
					2042	PRE-TRIAL OTHER	
		45		1.10	17	RESEARCH INVESTIGATN	
	LAWYER TOTAL	45	203.30	8.70			212.00
					2042	PRE-TRIAL OTHER	
	HERBERT B NEWBERG	48		2.00	09	CONFERENCE OTHER	
		48		2.00	18	INSP DOCUMENTS PROD	
	LAWYER TOTAL	48	142.50	4.00			146.50
	HOWARD L SCHAMBELAN	57					
	LAWYER TOTAL	57	33.10	.00			33.10

EXHIBIT "C-2"

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BURGLAR ALARMS - TIME

JUDGE HAROLD BERGER

DATE	DESCRIPTION	HOURS
1974		
APRIL		
16	Preparation and review of outstanding challenges with AHF & ST	3.50
23	Re: Outstanding challenges	1.50
30	Re: Outstanding challenges	2.50
MAY		
1	Re: Outstanding challenges	2.00
2	Re: Outstanding challenges	2.25
7	Re: Outstanding challenges	2.50
8	Re: Outstanding challenges	2.50
13	Re: Outstanding challenges	2.50
16	Re: Outstanding challenges	2.50
22	Re: Outstanding challenges	.50
23	Re: Outstanding challenges	1.00
24	Re: Outstanding challenges	2.00
30	Re: Outstanding challenges	2.50
JUNE		
3	Re: Outstanding challenges	.25
4	Re: Outstanding challenges	.75
6	Re: Outstanding challenges	1.50
10	Re: Outstanding challenges	.50

JUDGE HAROLD BERGER
(Continued)

DATE	DESCRIPTION	HOURS
1974		
JUNE		
11	Re: Outstanding challenges	.25
13	Re: Outstanding challenges	1.50
18	Re: Outstanding challenges	.50
19	Re: Outstanding challenges	.50
20	Re: Outstanding challenges	.50
25	Re: Outstanding challenges	1.25
26	Re: Outstanding challenges	1.00
27	Conference with Prof. Frey & ST	1.25
JULY		
1	Re: Outstanding challenges	1.00
2	Re: Outstanding challenges	2.50
3	Re: Outstanding challenges	5.00
8	Re: Outstanding challenges	.50
10	Re: Outstanding challenges	1.50
11	Re: Outstanding challenges	5.00
12	Re: Outstanding challenges	3.00
15	Re: Outstanding challenges	2.50
17	Re: Outstanding challenges	2.50
18	Re: Outstanding challenges	4.50
19	Re: Outstanding challenges	1.00
22	Re: Outstanding challenges	1.25

JUDGE HAROLD BERGER
(Continued)

DATE	DESCRIPTION	HOURS
1974		
JULY		
23	Re: Outstanding challenges	.50
25	Review of decision, prep. of memo	1.25
26	Prof. Frey, preparation	2.00
29	Telephone Dr. Frey, dictation of letter, review of Dr. Frey's letter	.50
AUGUST		
6	Telephone - Marie Telephone - T. Brislin Preparation and review	.50
7	Telephone Robert Levene Preparation	.50
1975		
FEBRUARY		
14	Investment	1.25
APRIL		
25		.50
30		.75
MAY		
1		.50
5	Memo from P. Reynolds	.25
5	Conference P. Reynolds on missing addresses	.50

BURGLAR ALARMS - TIME

ALEXANDER H. FREY

DATE		DESCRIPTION	HOURS
1974			
	APRIL		
16		Review files on outstanding challenges	5.00
23		Re: Outstanding challenges	3.00
30		Re: Outstanding challenges	3.00
	MAY		
1		Re: Outstanding challenges	2.50
2		Re: Outstanding challenges	2.50
3		Re: Outstanding challenges	2.50
7		Re: Outstanding challenges	2.50
8		Re: Outstanding challenges	3.00
13		Re: Outstanding challenges	3.50
16		Re: Outstanding challenges	3.00
22		Re: Outstanding challenges	3.00
23		Re: Outstanding challenges	3.00
29		Re: Outstanding challenges	3.50
30		Re: Outstanding challenges	3.50
	JUNE		
4		Re: Outstanding challenges	3.00
5		Re: Outstanding challenges	3.00
6		Re: Outstanding challenges	3.75
11		Re: Outstanding challenges	5.00
12		Re: Outstanding challenges	5.00

EXHIBIT "E"

ALEXANDER H. FREY
(Continued)

DATE	DESCRIPTION	HOURS
1974		
JUNE		
13	Re: Outstanding challenges	3.00
18	Re: Outstanding challenges	3.00
19	Re: Outstanding challenges	4.00
20	Re: Outstanding challenges	2.50
25	Re: Outstanding challenges	3.00
26	Re: Outstanding challenges	4.50
27	Re: Outstanding challenges	3.00
JULY		
2	Review file of outstanding challenges	3.00
3	Review file	5.00
9	Review file	5.50
11	Review file	5.00
12	Review file	2.75
20	Telephone Judge Berger	.50
26	Conference with Judge Berger; Correspondence	2.00

BURGLAR ALARMS - TIME

EARL D. GREENBURG

DATE		DESCRIPTION	HOURS
1971			
	December		
21		Class Administration	5.00
1972			
	January		
3		Class Administration	1.00
3		Class Administration	1.75
5		Class Administration	5.00
6		Class Administration	4.50
7		Class Administration	10.00
10		Class Administration	9.00
11		Class Administration	3.00
12		Class Administration	7.00
13		Class Administration	7.25
14		Class Administration	7.00
17		Class Administration	8.00
18		Class Administration	1.25
19		Class Administration	7.00
20		Class Administration	9.00
21		Class Administration	9.00
24		Class Administration	10.00
25		Class Administration	9.50

EARL D. GREENBURG

DATE	DESCRIPTION	HOURS
26	Class Administration	4.00
27	Class Administration	3.00
28	Class Administration	3.00
31	Class Administration	4.00
February		
1	Class Administration	7.00
2	Class Administration	5.50
3	Class Administration	8.50
4	Class Administration	9.00
5	Class Administration	8.00
7	Class Administration	9.00
8	Class Administration	8.00
10	Class Administration	9.00
11	Class Administration	10.00
12	Class Administration	4.00
14	Class Administration	9.00
15	Class Administration	6.00
16	Class Administration	3.00
17	Class Administration	11.00
18	Class Administration	7.00
19	Class Administration	3.00
March		
2	Class Administration	4.00
3	Class Administration	1.00
6	Class Administration	6.00

EARL D. GREENBURG

DATE	WORK DESCRIPTION	HOURS
7	Class Administration	5.00
8	Class Administration	6.50
9	Class Administration	5.00
13	Class Administration	10.00
14	Class Administration	8.00
15	Class Administration	6.00
16	Class Administration	8.00
—	Class Administration	1.50
27	Class Administration	1.50

BM

COPY

HEFFLER & COMPANY
CERTIFIED PUBLIC ACCOUNTANTS
SUITE 800, 3 PENN CENTER PLAZA
PHILADELPHIA, PA. 19102

March 6, 1972

David Berger, Esquire
1622 Locust Street
Philadelphia, Pa. 19103

re: Burglar Alarms

For services rendered from January 14 to March 6, 1972 in connection with Plaintiff's Claims:

Partners - Certified Public Accountants 107 hours @ $35.00	$ 3,745.00
Senior Supervisory Accountants 118 hours @ $17.50	2,065.00
Associates 672 hours @ $7.50	5,040.00
	$10,850.00
Xeroxing	225.00
TOTAL	$11,075.00

EXHIBIT "G"

665-8870

HEFFLER & COMPANY
CERTIFIED PUBLIC ACCOUNTANTS
3 PENN CENTER PLAZA, SUITE 800
PHILADELPHIA, PA. 19102

JACOB HEFFLER, C. P. A.
MELVIN A. HEFFLER, C. P. A.

October 21, 1975

David Berger, P.A.
1622 Locust Street
Philadelphia, Pennsylvania 19102

Re: Burglar Alarms Anti-trust Matter

For services rendered from June 4, 1974 to October 21, 1975:

Category	Hours	Hourly Rate	Amount
Partner - Jacob Heffler	53	$50	$ 2,650.00
Supervisor - Steven Goldman	92	30	2,760.00
Associate Accountants	491	20	9,820.00
Clerical Assistants	120	10	1,200.00
	756		$16,430.00

All time is supported by daily time records, which are available for inspection.

EXHIBIT "G-1"

EXHIBIT H
Time Expended by David Berger, P.A.
Through October 9, 1975

1. Total time of attorneys as a group by category of activity:

		Hours
(a)	Pleadings and motions	32.8
(b)	Discovery	173.00
(c)	Court appearances and preparation	282.75
(d)	Settlement negotiations	244.50
(e)	Settlement procedures	400.25
(f)	Settlement administration	1349.60
(g)	Fee application	194.25
(h)	Briefs and legal research	502.50
(i)	Appellate proceedings after Final Judgment	236.75
(j)	General	154.85
(k)	Fee agreements and interventions	10.00
	TOTAL:	3577.75

2. Total time of paraprofessionals as a group by category of activity:

(a)	Settlement administration	5168.60
(b)	Discovery	750.00
	TOTAL:	5918.60

3. Total time spent by each attorney as to each category of activity:

(a) Pleadings and motions

H. L. Montague	6.8
Herbert B. Newberg	16
H.L. Schambelan	10
TOTAL:	32.8

(b) Discovery

David Berger	12
H.L. Montague	67.9
Herbert B. Newberg	46.5
A.L. Lerner	23.5
H. L. Schambelan	23.1
TOTAL:	173

(c) Court appearances and preparation

David Berger	133
H.L. Montague	128.25
Herbert B. Newberg	11.5
Warren D. Mulloy	10.00
TOTAL:	282.75

(d) Settlement negotiations

David Berger	51.5
H.L. Montague	39
Herbert B. Newberg	154.0
TOTAL:	244.50

(e) Settlement procedures

David Berger	63.5
H.L. Montague	165.25
Herbert B. Newberg	166
Warren D. Mulloy	2.0
TOTAL:	396.75

(f) Settlement Administration

David Berger	69.25
H.L. Montague	558.25
Herbert B. Newberg	56.0
Harold Berger	76.75
Prof. Alexander Frey	113.00
Warren D. Mulloy	1.0
H. L. Schambelan	11.35
J.R. Lally	44.0
J.C. Meredith	33.25
L. Barrack	4.0
E.D. Greenburg	306.75
G.J. Rodos	34.0
P.C. Cohen	32.0
B. Shaw	10.0
TOTAL:	1349.60

(g) Fee Applications

David Berger	27.5
H.L. Montague	152.75
J.C. Meredith	14.00
TOTAL:	194.25

(h) Briefs and legal research

David Berger	46
H.L. Montague	268
Herbert B. Newberg	177.5
G.J. Rodos	6.5
M.G. Davidoff	3.0
B.K. Cohen	1.5
TOTAL:	502.5

(i) Appellate proceedings after final judgment

David Berger	102.5
H.L. Montague	134.25
TOTAL:	236.75

(j) General

David Berger	29.05
H.L. Montague	65.05
Herbert B. Newberg	60.00
Warren D. Mulloy	.75
TOTAL:	154.85

(k) Fee agreements & interventions

Herbert B. Newberg	10.0
TOTAL:	10.0

TOTAL (a) through (k) 3577.75

EXHIBIT H
Page Three

Minimum Hourly Rates For Attorneys In David Berger, P.A., For Routine Matters Regularly and Currently Billed Without Reference To Contingency, Success, The Quality of Work, Or Other Facts Which May Properly Be Taken Into Consideration

		Year Admitted
David Berger	125.00	(1938)
Herbert B. Newberg	100.00	(1962)
H. Laddie Montague	100.00	(1964)
Harold Berger	100.00	(1952)
Prof. Alexander Frey	100.00	(1921)
Warren D. Mulloy	100.00	(1955)
Leonard Barrack	75.00	(1969)
Joseph R. Lally	75.00	(1969)
Bruce K. Cohen	60.00	(1972)
Joel C. Meredith	70.00	(1970)
Gerald R. Rodos	60.00	(1971)
Alan M. Lerner	85.00	(1966)
Merrill G. Davidoff	50.00	(1973)
Barry N. Shaw	85.00	(1966)
Earl D. Greenburg	60.00	(1971)
Pauline C. Cohen	85.00	(1966)
Howard L. Schambelan	85.00	(1965)

EXHIBIT "I"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIMPSON THACHER & BARTLETT,
a partnership,

Plaintiff,

-against-

OCCIDENTAL PETROLEUM
CORPORATION,

Defendant.

74 Civ.

COMPLAINT

Plaintiff, Simpson Thacher & Bartlett, by its attorneys, Shearman & Sterling, for its complaint alleges:

AS TO ALL CAUSES OF
ACTION ALLEGED HEREIN

1. Plaintiff, Simpson Thacher & Bartlett, is and at all relevant times was a partnership engaged in the practice of the law with its principal place of business at One Battery Park Plaza in the City, County and State of New York. Each of the individuals comprising and doing business under the firm name and style of the partnership is a citizen of either New York, New Jersey, Connecticut or the District of Columbia, and none is a citizen or resident of California.

2. Defendant, Occidental Petroleum Corporation, is, upon information and belief, a corporation organized under the laws of the State of California and has its principal place of business in or about Los Angeles, California.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. The jurisdiction of this Court is based upon 28 U.S.C. §1332.

EXHIBIT J

4. In connection with the matters hereinafter alleged, defendant transacted business in the State of New York and this judicial district. In connection with said matters, certain officers and directors of defendant acting on its behalf had conversations and attended conferences and meetings in New York City and had numerous telephone conversations with persons in New York City. Defendant otherwise transacts business in this judicial district, and the claims hereinafter set forth arose in said district.

FIRST CAUSE OF ACTION

5. On or about February 18, 1971, a judgment in the amount of Twenty Three Million, Five Hundred Eleven Thousand, Three Hundred Thirty-Seven Dollars and Ninety-Four Cents ($23,511,337.94) was entered against defendant in the United States District Court for the Southern District of New York in an action numbered 67 Civ. 4042, which action is referred to herein as "Abrams v. Occidental" The judgment also provided for post-judgment interest on said sum from the date of entry of the judgment "at the rate of 7-1/2%, as provided by law." The judgment represented profits held to have been realized by defendant and recoverable under Section 16(b) of the Securities Exchange Act of 1934, along with prejudgment interest imposed by the Court. Defendant was not a regular client of plaintiff, and defendant had been represented in that action by attorneys other than plaintiff.

6. In March 1971, defendant requested plaintiff to represent it on its appeal in Abrams v. Occidental to the United States Court of Appeals for the Second Circuit provided that plaintiff's senior partner, Whitney North

Seymour ("Seymour"), would undertake the appeal with assistance from other attorneys of plaintiff. Plaintiff agreed so to represent defendant, provided that plaintiff would be paid time charges and disbursements and that, if a favorable result were achieved on appeal, an additional fee would be paid in an amount commensurate with the result achieved. Defendant agreed to these payment terms.

7. The appeal in Abrams v. Occidental was briefed and argued by Seymour in accordance with the agreement. The Court of Appeals reversed the judgment against defendant and ordered that summary judgment dismissing the complaint be granted in favor of defendant, although no motion for such judgment had been made by defendant in the district court. Thus, the decision on appeal, dated October 13, 1971 (450 F.2d 157), reversed on the merits the judgment against defendant of $23,511,337.94, plus accrued interest, and relieved defendant entirely of its liability.

8. Thereafter, plaintiff requested of defendant payment of the additional fee in light of the result achieved in the Court of Appeals. Defendant told plaintiff that payment of an additional fee would be made after a final decision by the Supreme Court of the United States, if review by the Supreme Court was sought. Defendant further retained plaintiff to represent defendant in any proceedings in the Supreme Court, on the understanding that defendant would be so represented by Seymour with the assistance of other attorneys of plaintiff and that the agreement for the additional fee would continue. A petition for certiorari was filed in said action, and thereafter Seymour filed a brief opposing said petition.

9. On April 17, 1972, the Supreme Court of the United States granted certiorari to review the decision of the Court of Appeals. Thereafter, the appeal was again briefed and argued for defendant in accordance with the agreement. On May 7, 1973 the Supreme Court affirmed the decision of the Court of Appeals in favor of defendant (Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582). On the day when the Supreme Court rendered its decision, the value of the district court's judgment against defendant, if it had not been reversed, would have been approximately $27,174,275.00, including post-judgment interest at applicable rates.

10. After the affirmance by the Supreme Court, plaintiff again requested payment of an additional fee commensurate with the result achieved, in addition to time charges, as had been agreed upon. Defendant has failed and refused to make such payment to plaintiff.

11. By reason of the foregoing, there is now due and owing from the defendant to the plaintiff a sum in excess of $1,500,000.00.

SECOND CAUSE OF ACTION

12. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 5 herein.

13. Between approximately March 1971 and May 1973, at the request of defendant, plaintiff performed important and unique services for the defendant as its attorneys in connection with the appeals in Abrams v. Occidental described in paragraphs 7, 8 and 9 herein.

14. Plaintiff's services benefited defendant by obtaining both a reversal of the judgment against it of $23,511,337.94 plus interest and a final dismissal of the

claims made under

action. The reasonable value of the services of plaintiff in light of the result achieved by it is in excess of $1,500,000.00, in addition to time charges which have been paid by defendant.

15. By reason of the foregoing, there is now due and owing from defendant to plaintiff a sum in excess of $1,500,000.00.

WHEREFORE, plaintiff demands judgment against defendant in an amount in excess of $1,500,000.00, together with interest from November 9, 1973.

Dated: New York, New York
February 15, 1974

SHEARMAN & STERLING

By _____
A Member of the Firm
Attorneys for Plaintiff
53 Wall Street
New York, New York 10005
(212) 483-1000

Plts. Exh. 2.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et. al.	:	68 Civ. 4026
	:	(E.D. Pa. Civ. 68-1478)
v.	:	
	:	
GRINNELL CORPORATION, et. al.	:	M 19-92

MANHATTAN-WARD, INC., et. al.	:	68 Civ. 4028
	:	(E.D. Pa. Civ. 68-1489)
	:	
v.	:	
	:	
GRINNELL CORPORATION, et. al.	:	

1225 VINE STREET BUILDING, INC.	:	68 Civ. 4027
	:	(E.D. Pa. Civ. 68-1479)
	:	
v.	:	
	:	
GRINNELL CORPORATION, et. al.	:	

COMMONWEALTH OF PENNSYLVANIA	:	
	ss	
COUNTY OF PHILADELPHIA	:	

AFFIDAVIT

HERBERT B. NEWBERG, ESQUIRE, being first duly sworn according to law, deposes and says:

1. That he was a partner at the law firm of Cohen, Shapiro, Berger, Polisher and Cohen, Philadelphia, Pennsylvania until he separated from that firm in September, 1970. Thereafter, he was a member of David Berger, P.A., Attorneys-at-Law, 1622 Locust Street, Philadelphia, Pennsylvania until late April, 1972.

2. That during the period 1968 through April, 1972, he expended legal services in connection with the above-captioned litigation.

3. That from 1968 through September, 1970, he kept contemporaneous time records which accurately reflected the legal services he expended. Those records were logged into a computer and printouts were made monthly.

4. That he did not maintain daily time records for this case during the period November, 1970 through March 1972, but that in April, 1972, he reconstructed on a monthly basis the time expended by him during that period by reviewing his work files, pleadings and briefs' files, correspondence files, calendar and other relevant documents.

5. That Exhibit "A" annexed hereto was prepared under his direction and was the result of his reconstruction of time expended. To the best of his knowledge, information and belief, Exhibit "A" is an accurate, if not conservative, accounting of the time expended by him in the above action during the period November, 1970 through March, 1972.

6. That for April, 1972, he maintained contemporaneous daily time records.

Herbert B Newberg
HERBERT B. NEWBERG

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9th DAY
OF October ,1975

Marie R. Russo
NOTARY PUBLIC

MARIE R. RUSSO
Notary Public ... Philadelphia Co.
My ... 1977

Time record summary for the month of Nov. 1970

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Prep. of plaintiff's objection to defendants' interrogatories, conf. with plaintiffs' counsel	17.0
HBN	Review of telegram from Clerk, Supreme Court of U.S. re: Petition for Certiorari against Russ Togs denied and office conf.	2.5

Time record summary for the month of Dec. 1970

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Preparation of plaintiff's joint brief in Support of National Class actions, staff conferences proofreading	42.0
HBN	review of memorandum to counsel from U.S. District Court, re: briefing schedule; staff conferences	2.5

Time record summary for the month of Jan. 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Final prep. of class action Brief and filing	18.0
HBN	Review of Memorandum in support of determination that plaintiff's actions are maintainable, as class actions (single state cases) staff conferences.	6.0
HBN	Preparation and filing of motions to determine class action	4.5
HBN	Preparation of notice of change of name and address (David Berger, 1622 Locust Street, Philadelphia)	.5

Time record summary for the month of Feb. 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Review of defendants' affidavits in opposition to maintenance of these suits as National Class Actions; staff conferences	7.0
HBN	Review of Defendants' memorandum in opposition to maintenance of these suits as National Class Actions; staff confernces.	24.0
HBN	Review of pretrial order #6	2.5

BERGER, P. A., ATTORNEYS AT LAW

Time record summary for the month of March, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Preparation of plaintiffs' joint reply memorandum in support of maintenance of these suits as National Class Actions.	31.0
HBN	Review of Affidavit of H. Laddie Montague, Jr., in support of National Class Action, staff conferences	7.0
HBN	Review reply memorandum in support of determination that plaintiffs actions are maintainable as class actions (single state cases)	4.5
HBN	settlement negotiations, staff conferences, correspondence	38.0

DAVID BERGER, P. A., ATTORNEYS AT LAW

Time record summary for the month of April 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Settlement negotiations; staff conferences, correspondence.	12.0

Time record summary for the month of May, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Settlement negotiations, staff conferences, correspondence	22.0

DAVID BERGER, P. A., ATTORNEYS AT LAW

Time record summary for the month of June, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Settlement negotiations, staff conferences, correspondence	17.0

Time record summary for the month of July, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Preparation and filing of Courtland J. Silver for leave to intervene as a party plaintiff in CA 68-4028	5.5
HBN	Review of memorandum in opposition to Motion to Intervene	4.5
HBN	Settlement negotiations, staff conferences, correspondence	29.0

Time record summary for the month of August 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Settlement negotiations, staff conferences.	32.0

Time record summary for the month of September, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Settlement negotiations, staff conferences, correspondence	41.0

Time record summary for the month of October, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Settlement negotiations, staff conferences, correspondence	37.0

Time record summary for the month of November, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Settlement negotiations, staff conferences, correspondence	28.0

Time record summary for the month of December, 1971

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Review of Settlement Order #1	6.0
HBN	Review of Affidavit of Frank C. Fritz, Jr.	3.5
HBN	Review of Affidavit of William F. Halpern	2.0
HBN	Review of Legal Notice (RE: NY Times and Wall Street Journal)	.5
HBN	Review of Affidavit of Lawrence W. Thompson	3.0
HBN	Review of Order entered	1.0
HBN	Preparation and filing of Stipulation RE: designation of Class Action Committee	4.5
HBN	Review of Affidavit of Robert O. Donnelly	5.0
HBN	Review of Affidavit of Harry Garfinkel	2.5
HBN	Settlement Negotiations, staff conferences, correspondence	32.0

Time record summary for the month of January, 1972

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Correspondence, telephone conversations, claim processing, staff conferences	12.0
HBN	Preparation and filing of Affidavit of H. Laddie Montague, Jr.	12.0
HBN	Review of Settlement Order #2	2.0

Time record summary for the month of February, 1972

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Correspondence, telephone conversations, claim processing, staff conference.	17.0

DAVID BERGER, P. A., ATTORNEYS AT LAW

Time record summary for the month of March, 1972

CASE: City of Detroit, et. al. v. Grinnell, et. al.

ATTORNEY	DESCRIPTION OF WORK DONE	TIME
HBN	Correspondence, telephone conversation, claims processing, staff conference.	13.0

Pltf. Exh. 3.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et. al.	:	68 Civ. 4026 (E.D. Pa. Civ. 68-1478)
v.	:	
GRINNELL CORPORATION, et. al.	:	M 19-92

MANHATTAN-WARD, INC., et. al.	:	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
v.	:	
GRINNELL CORPORATION, et. al.	:	

1225 VINE STREET BUILDING, INC.	:	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)
v.	:	
GRINNELL CORPORATION, et. al.	:	

COMMONWEALTH OF PENNSYLVANIA :
ss
COUNTY OF PHILADELPHIA :

AFFIDAVIT

DAVID BERGER, ESQUIRE, being first duly sworn according to law, deposes and says:

1. I have read the affidavit of October 28, 1975 of H. Laddie Montague, Jr. (the "Montague Affidavit") to be filed in the above-captioned action.

2. The matters set forth in the Montague Affidavit relating to my time records and the time expended by me in this litigation are true and correct to the best of my knowledge, information and belief.

3. The matters set forth in the Montague Affidavit relating to the status and qualifications of the attorneys of David Berger, P.A., and the billing rates, practices and experiences of our firm are also true and correct to the best of my knowledge, information and belief.

4. Likewise, the matters set forth therein relating to the contingent fee contracts with our clients in this litigation are true and correct to the best of my knowledge, information and belief.

/s/ David Berger

DAVID BERGER

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 30th DAY
OF October ,1975.

/s/ Marie R. Russo

NOTARY PUBLIC

MARIE R. RUSSO
Notary Public, [illegible] Philadelphia Co.
My Commission expires June 15, 1977

Plts. Exh. 4.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	68 CIV. 4026
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al.	68 CIV. 4028
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al.	68 CIV. 4027
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1479)

AFFIDAVIT

David Berger, Esquire, being duly sworn, deposes and says:

1. I am a member of the bar of the Supreme Court of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania and the Supreme Court of the United States. I and my firm, David Berger, P.A., Attorneys At Law, 1622 Locust Street, Philadelphia, Pennsylvania, 19103 (hereinafter collectively "Petitioner") are counsel for each of the class representative plaintiffs in

the three above-captioned cases. I submit this affidavit in support of a Petition for an award of a twenty-five percent (25%) counsel fee plus reimbursement for out-of-pocket costs actually incurred and to be incurred in the continuing administration of these cases.

2. In this affidavit, I shall set forth the history of the litigation and its prosecution, the terms of the settlement and the petitioner's request for attorneys' fees and reimbursement of costs.

I.

HISTORY OF THE LITIGATION AND ITS PROSECUTION:

A. Commencement and the Nature of the Litigation.

3. The three above-captioned actions were commenced on July 10 and 11, 1968 in the Eastern District of Pennsylvania as national class actions on behalf of (generally defined) all state, county and municipal governmental entities, all commercial entities and all industrial entities.

4. Each complaint alleges a violation by the defendants of Sections 1 and 2 of the Sherman Act, charging the defendants with an unlawful combination and conspiracy to restrain trade and monopolize on a nationwide basis the "accredited central station protective services" industry. Pursuant to the aforesaid conspiracy, defendants are alleged

to have adopted a course of action calculated, inter alia, (1) to drive competitor companies out of business through predatory pricing, (2) to acquire competitor companies, and (3) where possible, to fix and maintain their prices to subscribers at artificial and higher levels than would have prevailed in a normal competitive market.

5. On October 3, 1968, the above-captioned cases, along with all other similar cases pending throughout the United States, were transferred pursuant to 28 U.S.C. §1407 to this Court for consolidation and coordination for pre-trial purposes only. As a result, approximately 74 cases*/ were consolidated before this Court, 55 of which were commenced by subscribers and 19 of which were commenced by injured competitors.**/

B. Prosecution of the Actions:

6. Upon consolidation and coordination of these cases, a Steering Committee of Plaintiffs' Counsel was established so that one set of plaintiffs' discovery would be filed and served. While consolidation afforded many plaintiffs' counsel the opportunity to take a back seat and receive

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*/ The Federal Government damage action is also pending before this Court.

**/ In addition, one competitor case was allowed to remain in the Eastern District of Pennsylvania. Furthermore, two earlier competitor cases had been settled prior to this §1407 transfer.

a free ride on the work of others, Petitioner has assumed an aggressive and active role. Accordingly, Petitioner became an active member of the Steering Committee and drafted the Motion for Production of Documents, which became the singularly most important and significant discovery tool in these cases.*/ Compliance with this Motion for Production directly led to the establishment of a document depository and the production therein by defendants in excess of 100,000 documents. Although not the original drafter, Petitioner likewise took an active part in reviewing and finalizing the joint set of plaintiffs' interrogatories filed in these cases.

7. With respect for the preparation for trial, each plaintiffs' counsel had the full responsibility of preparing his own case. To the best of Petitioner's knowledge, there was no coordination of effort among various plaintiffs' counsel to review and analyze the fruits of discovery and the record in U.S. v. Grinnell, supra (hereinafter "Government Record"). Accordingly, Petitioner undertook and did, in fact, make a careful review and analysis of the Government Record**/ as well as an inspection of the Depository and documents therein.

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*/ A review of the Record in the Government enforcement action, U.S. v. Grinnell Corp., Civil Action No. 2785 (D.R.I.) will reveal that the Government itself considered its case a "document" case.

**/ This revealed that the Government case was based in part on a theory different from that on which these class actions are grounded. Indeed, to the extent that the Government case relied upon predatory pricing practices, it is antagonistic to these class actions.

8. Subsequent to the initial joint filing of discovery as set forth in paragraph 6, supra, the subscriber plaintiffs and the competitor plaintiffs decided to go their separate ways on any future discovery. The compelling reason for this separation was that th claims of these two catagories of plaintiffs were diametrically opposed to each other. The subscribers' claims for damages are founded on allegations of overcharge while the competitors' claims for damages are bottomed upon allegations of predatory pricing, including defendants' sales of services below cost.

9. Defendants' Motion for Partial Summary Judgment:

(a) At an early stage in these proceedings, defendants filed a motion for partial summary judgment alleging that the Government enforcement action had terminated on June 13, 1966, the date of the Supreme Court opinion in United States v. Grinnell Corp., 384 U.S. 563, and accordingly that the applicable statute of limitations was tolled only through July 13, 1967. Defendants argued that any private suit filed subsequent to July 13, 1967 was barred by the statute of limitations.

(b) Petitioner prepared the initial draft of the plaintiffs' joint brief submitted to this Court. This Court, on consideration of briefs and affidavits and without oral argument, denied defendants' motion and held that the Government enforcement action did not terminate until September 9, 1967 and that accordingly the statute of limitations was

tolled until September 9, 1968. Russ Togs, Inc. v. Grinnell Corp., 304 F. Supp 279 (S.D.N.Y. 1969). Petitioner's and plaintiffs' successful opposition to this motion preserved the viability of these law suits.

(c) This Court, sua sponte, certified for appeal, pursuant to 28 U.S.C. §1292(b), its interlocutory order denying summary judgment. Defendants, convinced of the correctness of their motion, moved for permission to appeal. Petitioner was an active participant in the preparation of the papers filed in opposition to the granting of the appeal and also in the preparation of the brief filed in the Second Circuit on behalf of plaintiffs-appellees. Petitioner argued the case in the Court of Appeals on behalf of the three above-captioned class actions and for others.*/ Argument was successful. The Court of Appeals affirmed the decision of this Court. 426 F. 2d 850 (2nd Cir. 1970).

(d) Not to be denied, defendants filed in the Supreme Court of the United States a Petition for a Writ of Certiorari. Petitioner once again was an active participant in drafting the Brief for the Respondents in Opposition. Once again, plaintiffs-respondents were successful; the Supreme Court denied certiorari. 400 U.S. 878 (1970).

10. Class representative plaintiffs were also confronted with a Motion to Dismiss the action against defendant

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*/ One counsel for certain competitor plaintiffs also presented oral argument.

Automatic Fire Alarm Company of Delaware ("AFADEL") on the ground that it was not in existence at the time of suit and accordingly, was never served. Petitioner countered that motion with a Motion to Amend under Rule 15(c), Fed. R. Civ. P., to substitute Automatic Fire Alarm Company as a defendant for AFADEL, the former having acquired the latter. The motion to amend was granted, the amendment relating back in time to the original filing date of the complaints. Order of September 19, 1969.

B. History of These Class Actions:

11. Of the 55 subscriber suits pending in this Court, the three above-captioned cases were the only national class actions filed. Subsequent to the filing of these complaints, three statewide class actions were filed on behalf of governmental entities within Connecticut, Maryland and New Jersey.*/

12. Petitioner early moved to have the above-captioned actions maintained as national class actions as alleged. This motion was stayed by Order of the Court, pending final determination of the defendants' Motion for Partial Summary Judgment (referred to in ¶9, supra). Towards the end of 1970, the Court determined the time was appropriate to decide this issue.

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*/ These 3 statewide governmental classes have been carved out of the national governmental class.

13. The class action determination was a hotly contested issue with defendants. Petitioner initially submitted an extensive brief (46 pages) in support of the class action. Defendants answered with a voluminous reply brief together with 56 printed pages of affidavits. Petitioner then filed an extensive reply brief (40 pages) together with Petitioner's affidavit. Oral argument was presented to the Court on June 18, 1971.

14. The importance of upholding the class actions herein was two-fold: (a) it was the only means of preserving the viability of claims of absent class members, whose claims would otherwise be barred by the expiration of the statute of limitations;*/ and (b) the therapeutic effect of the class action device in effectively enforcing the antitrust laws.

15. While the class action issues were awaiting Court determination, settlement negotiations proceeded between Petitioner and counsel for defendants. The parties requested the Court to delay any decision on the class action issues pending these settlement negotiations. The Court agreed, thus enabling Petitioner and counsel for defendants to negotiate the settlement now before this Court.

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*/ Defendants have made the argument that the class action, even if upheld, would not toll the statute of limitations for absent class members.

D. History of Settlement Negotiations:

16. With respect to the proposed settlement, it was Petitioner who initiated negotiations. No other counsel for any plaintiff participated in these negotiations nor in the preparation of the settlement agreement and the procedures conceived therein. The first settlement meeting was February 16, 1970. At that time, defendants' appeal from this Court's denial of their partial summary judgment motion was pending in the Second Circuit. No real progress was made, essentially because the defendants indicated that it was premature to consider settlement until defendants had exhausted the appeal procedure on their summary judgment motion.

17. A second meeting with defendants was held on March 26, 1970, following the Argument in the Second Circuit of defendants' summary judgment appeal. Once again, fruitful settlement negotiations were premature. Petitioner surmised that defendants' coolness to serious settlement negotiations was premised not only on the pendency of the appeal, but also on defendants' evaluation of the still unbriefed and undetermined class action issue, with defendants insisting that the national classes would not be upheld.

18. After the class action issues had been fully briefed by all parties and oral argument had been presented to the court, defendants accepted Petitioner's renewed invitation to discuss settlement on a class-wide basis. Thus, commencing on June 30, 1971, Petitioner travelled to New York

on four separate occasions to attend four lengthy settlement meetings. It was these meetings, interspersed with telephone calls and correspondence, which resulted in the settlement now before this Court. Thereafter the settlement agreement was negotiated and drafted and proposed orders were submitted to the Court to aid in the administration of the classes and to establish the procedures necessary for approval of the settlement. Needless to say, additional meetings were required in order to reach agreement on these settlement papers.

19. In negotiating the proposed settlement, Petitioner was ever mindful of the importance of upholding the class actions, that being the only judicial vehicle by which absent class members could have redress for the alleged damages they suffered as a result of defendants' antitrust violations. Accordingly, it was paramount to Petitioner that any settlement must provide: (a) that the three national classes be recognized and be construed as broadly as possible; (b) that the settlement period be as long as possible; and (c) that the very best notice possible be given. All these goals were attained in the proposed settlement, thus assuring that the greatest number of subscribers would be given an opportunity to participate in the litigation and share in the proposed settlement fund.

E. Administration of the Class Actions and the Settlement:

20. A printed Legal Notice was mailed on December

23, 1971 to each current central station subscriber of defendants ADT, Holmes and AFA, consisting of approximately 89,816 subscribers. In addition, Legal Notice was published (1/8th page) in each regional edition of the New York Times and the Wall Street Journal, publication occurring on the following dates: December 17, 1971, December 23, 1971 and December 30, 1971. In response to the Legal Notice, Petitioner was barraged with telephone calls and correspondence, all of which had to be and was answered.

21. As provided in Settlement Order No. 1, a class action committee was established to oversee the management and administration of the Notice program. Petitioner assumed full responsibility for the actual management and administration of this program. Accordingly, all mail received in response to the Notice, including "Sworn Statements of Claim" and "Written Requests for Exclusion", were forwarded to Petitioner's offices for processing.

22. Commencing in early January, 1972, in addition to the aforementioned telephone calls and correspondence, class members commenced filing "Sworn Statements of Claim" (hereinafter "claims") and "Written Requests for Exclusion". Each Request for "Exclusion" was reviewed and filed. Each Claim was reviewed for correctness and if invalid for any reason, was set aside to be challenged. Many challenges required mathematical calculations. A challenge letter by

the class action committee was sent to each challenged claimant setting forth the grounds for the challenge and, where possible, the amount of the claim challenged. Approximately 3,216 challenge letters have been sent.*/ Approximately 14,079 claims have now been received.

23. In response to the aforementioned challenged letters, Petitioner again received an overwhelming number of telephone calls and letters (filed with the Clerk), many of which needed response. Because the time within which to respond to the challenges was short, Petitioner undertook to respond to letters by collect telephone calls rather than in writing. In this and every other respect, Petitioner did everything possible to cooperate with and assist members of the class.

24. Because of the volume of claims filed, Petitioner has, with the approval of the class action committee, placed all claims, both challenged and unchallenged, on a computer. In this manner, administration of the final resolution of claims and allocation and distribution of the proposed settlement fund will be greatly facilitated and its accuracy assured.

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*/ Subsequent to March 2, 1972, the day when the challenge letters were to be mailed, additional claims have been filed. Challenges to these claims have been sent to the claimants. Other claims, filed within the two weeks, have recently been mailed. Because of time limitations, these claims and the challenges thereto do not appear on the computer print-out.

25. While all the foregoing work was being performed by Petitioner, and being performed under pressure to meet the deadlines set forth in Settlement Order No. 1, Petitioner was required to respond to a motion by certain class members requesting the extension of the exclusion date to May 1, 1972 and further requesting voluminous discovery from the class representative plaintiffs as well as defendants. In opposition to that motion, Petitioner prepared two memoranda of law and appeared for oral argument. The motion is currently awaiting decision by the Court.

26. Because of the number of claims filed and the necessity for accuracy in cataloging the claims on a computer, the Class Action Committee requested an extension of time of one month to file a listing of all claims, a proposed allocation of settlement and a petition for award of attorneys' fees and costs. The extension was granted in Settlement Order No. 2, dated April 3, 1972.

F. Future Work Involved:

27. Many challenges to claims will have to be resolved. Of the approximately 3,216 claims challenged, many claimants either have agreed with the challenge by the class action committee, have not responded to the challenge or have submitted a corrected claim which cures the challenge. In addition, Petitioner estimates that at least 750 claimants have requested review of their challenge. Whatever procedure the Court decides to employ to resolve these challenges, be

it through a magistrate, master or otherwise, Petitioner expects to participate actively in the proceedings and is ready, willing and able to do so.

28. Once challenges are resolved, the final allocation of the Settlement Fund must be submitted to this Court for approval, and if approved, distribution of the first installment of the settlement fund must be made. This procedure must be followed with respect to the additional four installments. Petitioner assumes full responsibility for the collection, allocation, and distribution of each installment of the Settlement Fund, of course all with prior approval and direction by the Court.

29. The hearing on approval of the proposed settlement is now scheduled for May 24, 1972. Prior thereto, Petitioner will submit to the Court a memorandum in support of the proposed settlement and present any evidence necessary or required to demonstrate that the settlement is a fair, adequate and just one.

30. In many other class action cases, the counsel for representative plaintiffs, once having negotiated a settlement, have walked away from the proceeding and left the administration of the settlement to a master appointed by the Court. Petitioner has already demonstrated and wishes to inform the Court that Petitioner will not abrogate Petitioners duties as counsel for class representatives and will continue

to participate actively in these cases, in all phases and in whatever capacity necessary, until the final recovery (approximately four years from now) is obtained and distributed to those class members entitled to share in it. All of this will be done pursuant to the Court's supervision and approval.

II.

THE TERMS OF THE PROPOSED SETTLEMENT

31. The proposed settlement is embodied in Settlement Agreement Letter ("Agreement") dated August 27, 1971 and is attached as Exhibit "A" to Settlement Order No. 1.

32. Class Actions: Paragraph 3 of the Agreement contains defendants' agreement that these actions be upheld as class actions for the purpose of this settlement. However, in the event the settlement is not approved or otherwise is not consummated, defendants expressly "retain all rights to object to the maintenance of the actions as class actions." Accordingly a most important aspect of this settlement is the agreement of defendants to the maintenance of these actions as class actions as those classes were defined in the complaint, e.g., as national classes. Due solely to this provision, the claims of absent class members remained alive; without it, their claims would have been barred by the applicable statute of limitations. If the settlement fails, not only will the class action issue remain for this Court's determination, but

the claimants will again be subjected to the risk of having their claims barred by the statute of limitations.

33. Notice to the Class: The agreement (¶4) provides for the best Legal Notice practicable under the circumstances. This provision resulted in Notice being given as set forth in paragraph 20, supra at p.10. Petitioner believes that the Legal Notice given in this case far exceeds in effectiveness the Notice given in other antitrust class action litigation. Furthermore, the Notice informed potential class members not only of the pendency of the actions but also of the existence of the proposed settlement and its details, thus evoking a response to the Notice far greater than what it would have been had the notice not been so full and effective.

34. Cost of Notice: The Agreement [¶4(b)(iii)] expressly provides that defendants will bear the costs incurred in connection with the Legal Notice given, which cost amounted to approximately $37,895.17. Without this provision, these costs would normally be paid from the Settlement Fund, thus being borne by the participating class members.

35. The Period For Includable Transactions: In cases such as these, the settlement is normally limited to transactions occurring within the four-year period preceeding the filing of the Federal Government's Criminal or Civil

Complaint. For example, settlements in the following anti-trust cases were limited to a four year period: City of Philadelphia v. Morton Salt Company, Civil Action No. 33781 (E.D. Pa.); City of Philadelphia v. Interpace Corporation, Civil Action No. 43008 (E.D. Pa.); City of Philadelphia v. General Host Corp., Civil Action No. 68-704 (E.D. Pa.); School District of Philadelphia v. Harper and Row Publishers, Inc., Civil Action No. 68C 2144 (N.D. Ill.), Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, Civil Action No. 41773 (E.D. Pa.). In Philadelphia Electric Co. v. Anaconda American Brass Company, Civil Action No. 41734 (E.D. Pa.), the settlement period was six years.

In the cases sub judice, four years prior to the Government enforcement complaint would include the period 1957 to 1961. However, Petitioner was successful in including within the settlement all payments to the defendants for installations made and services rendered within an 11-1/4 year period, April 13, 1957 through July 11, 1968. Because of this elongated period, potential class members who may not have taken service from defendants during the 1957-1961 period are included within the Settlement and will share in the Settlement Fund.

36. The Settlement Fund: In settlement of these cases as national class actions, defendants have agreed to pay $10,000,000, to be paid in five equal installments, as follows:

Upon Entry of Final Judgment:*/	$2,900,000	
On January 15, 1973:	$2,900,000	plus interest
On January 15, 1974:	$2,900,000	plus interest
On January 15, 1975:	$ 325,000	plus interest
On January 15, 1976:	$ 975,000	plus interest

Defendants have the right to prepay all or any portion of any installment, without penalty but with accrued interest up to the date of payment.

37. Interest on Settlement Fund: Interest on the four installment payments is to be calculated at the prime rate prevailing at time to time during that period at the Chase Manhattan Bank, New York, New York, plus one point. Assuming that the prime rate averages 5% during the period of payments, interest will accrue at the rate of 6% or in a total amount of $695,452.00. Parenthetically, this amount of interest is more than ample to cover any costs of litigation and administration, with the substantial excess available for distribution among those sharing in the proposed settlement. Moreover, this interest is not subject to any award of attorneys' fees.

III.

PETITIONER AND PETITIONER'S REQUEST FOR FEES AND REIMBURSEMENT OF COSTS

A. Standing of Petitioner at the Antitrust Bar:

3. David Berger and David Berger, P.A., despite its small size, (originally five, presently eight lawyers), have earned the reputation of being among the foremost

plaintiffs' antitrust counsel in the country. Petitioner's antitrust cases which have been completed or which are now pending are the following:

A. Litigation Completed:

City of Philadelphia v. Morton Salt Company, 248 F. Supp. 506 (E.D. Pa. 1965);

Philadelphia Electric Company v. Anaconda American Brass Company, 43 F.R.D. 452 (E.D. Pa. 1968);

Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969);

City of Philadelphia v. Sterling Faucet Company, (E.D. Pa. C.A. No. 43923);

Regal-Tyson, Inc. v. Globe Ticket Company (E.D. Pa. C.A. No. 43221);

City of Philadelphia v. General Host Corporation, (E.D. Pa. C.A. No. 68-704);

City of Philadelphia v. United States Steel Corporation, (E.D. Pa. C.A. No. 39517);

City of Philadelphia v. Interpace Corporation, (E.D. Pa. C.A. No. 43008).

Kirihara v. Bendix Corp., 1969 CCH Trade Cases ¶72,941 (D. Haw. 1969).

B. Pending Cases:

County of Lackawanna, Pennsylvania v. Automobile Manufacturers Association (C.D. Cal., M.D.L. Docket No. 31) (re motor vehicle air pollution control devices);

City of Philadelphia v. Emhart Corporation, 50 F.R.D. 232 (E.D. Pa. 1970) (re master lock and key systems);

City of Philadelphia v. Chas. Pfizer and Sons, Inc., (E.D. Pa. C.A. No. 68-144) (re antibiotics);

Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, (E.D. Pa. C.A. No. 41773) (re plumbing fixtures);

City of Detroit v. American Bakeries Company, (E.D. Mich. C.A. No. 33046) (re bakery products);

City of Philadelphia v. American Oil Company, 53 F.R.D. 45 (D.N.J. 1971) (wholesale and retail gasoline);

Holy Redeemer Hospital v. Bristol-Myers Company, (D.D.C.C.A. No. 338-71) (re ampicillin);

Philadelphia Housing Authority v. Fibreboard Corporation, (N.D. Cal., C.A. No. 51005) (re gypsum wallboard);

City of Philadelphia v. General Motors Corporation, (E.D. Pa., C.A. No. 70-2753) (re Governmental auto fleet discounts);

State of Michigan v. American Cast Iron Pipe Company, et al., (N.D. Ala. 71-1122-S) (re cast iron pipes).

In City of Philadelphia v. Morton Salt Company, supra, Petitioner acted as lead counsel in establishing a national Governmental class under Rule 23 prior to its

amendment against producers of rock salt. The copper pipe and brass mill tube cases were the first price-fixing treble damage actions under amended Rule 23 in which a national class was upheld. 43 F.R.D. 452 (E.D. Pa. 1968). In Illinois v. Harper & Row Publishers, Inc., supra, Petitioner successfully represented a class on behalf of governmental bodies and school districts throughout the United States. In City of Philadelphia v. Interpace Corporation, supra, Petitioner successfully represented eight statewide Governmental classes Interpace Corporation v. City of Philadelphia, 438 F. 2d 401 (3rd Cir. 1971). Petitioner is co-lead counsel in two pending nationwide class actions, one against the manufacturers of master lock and key systems, City of Philadelphia v. Emhart Corporation, 50 F.R.D. 232 (E.D. Pa. 1970) and the other against the automobile manufacturers for conspiring to delay the development and installation of air pollution control devices on domestic automobiles, County of Lackawanna v. Automobile Manufacturers Association, 52 F.R.D. 398 (C.D. Cal. 1970); appeal pending. David Berger successfully obtained certification of two national classes in that case and argued in support thereof in the Ninth Circuit. The foregoing incomplete list of cases illustrates the vast experience of plaintiffs' counsel in antitrust litigation.

39. In addition to the foregoing, David Berger, Esq., the principal plaintiffs' trial lawyer in these class actions and under whose direction every phase of this litigation was conducted, is nationally recognized as an outstanding trial attorney, as evidenced by the following positions held by him:

a. City Solicitor, City of Philadelphia 1956 through 1963

b. Member of United States Supreme Court Advisory Committee which formulated Rules of Evidence for the United States Courts

c. Fellow, American College of Trial Lawyers

d. Fellow, International Academy of Trial Lawyers; Chairman, Antitrust Committee

e. Member, Advisory Board of the Bureau of National Affairs, Inc. re Antitrust Trade and Regulation Report

f. Former Chancellor, Philadelphia Bar Association.

As City Solicitor of Philadelphia, Petitioner Berger commenced one of the first of the Electrical Equipment antitrust cases on behalf of a non-federal government entity. David Berger has frequently lectured to groups of antitrust lawyers throughout the United States, including the Practising Law Institute, the New York State Bar Association, the Texas State Bar Association and The Philadelphia Bar Association. Mr. Montague will be lecturing before the Pennsylvania Bar Institute. Mr. Berger has published articles relating to antitrust and class actions.

B. Time Devoted and to be Devoted to These Actions:

40. During the period July 1, 1968 through April 19, 1972 Petitioner-Firm has dedicated a total of 6,233.25 hours to this litigation, not including secretarial and clerical help. Many of these hours have been odd hours, i.e., evenings and

weekends. From July 1, 1968 through April 19, 1972, Messrs. Berger, Montague, Schambelan and Newberg, senior attorneys in David Berger, P.A., spent a total of 1,814.45 hours. Messrs. Greenburg, Meredith, Lally and Rodos, attorneys, and Ms. Cohen, Esquire, spent a total of 542.25 hours. In addition, petitioner has for several years employed para-professionals under the direct supervision of the senior attorneys to assist in the preparation of litigation. These para-professional*/ have spent a total of 3,876.55 hours in connection with this litigation up to and including April 19, 1972. In addition, Petitioner, in order to process claims and calculate challenges, has used the services of other non-legal personnel, including professional accountants, who have through April 19, 1972, spent 897 hours in connection with this litigation.

41. In addition to the foregoing, substantial time (estimated to approach 1,000 hours) will be required by Petitioner to complete the procedures outlined in paragraphs 27 through 30, supra, in order to bring this settlement and litigation to its successful culmination and to distribute the proceeds thereof in accordance with the order of this Honorable Court.

42. Petitioner-Firm is a professional association comprised of eight attorneys and is of limited resources. Over the course of this litigation, Petitioner has made approximately

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*/ The para-professional staff employed by Petitioner has been trained by the senior attorneys in Petitioner's Firm to assist in the preparation and administration of antitrust litigation. One member of the staff has been trained at the Para-Legal Institute in Philadelphia.

forty trips to New York City for meetings with counsel, pre-trial conferences and court arguments, and visits to the document depository. Indeed, many additional trips are anticipated. The time and effort expended by Petitioner in the prosecution of these cases have mostly been demanding and have been performed under the severe pressures inherent in this type of litigation.

C. Expenses Incurred and to Be Incurred:

43. Expenses Incurred: To March 31, 1972 out-of-pocket expenses on behalf of the representative plaintiffs and the class members have totalled $14,918.73. These costs represent both costs of conducting the litigation and costs of administering the class actions and the settlement procedures. With approximately 14,079 claims filed, the costs to date represent approximately $1.06 per claim. The economy of out-of-pocket costs in these cases was possible only due to Petitioner's experience and expertise in this type of litigation.

44. Expenses To Be Incurred: Additional expenses are anticipated and will be incurred relating to the completion of the administration of the claims, the settlement hearing, and allocation and distribution of settlement proceeds, if the proposed settlement is approved. As previously stated, all claims are being recorded on a computer. While only initial billings have yet been made, it is estimated that the initial cost for computerization of the claims, including challenged claims,

will approximate $12,000. Additional computer costs will be forthcoming as the outcome of challenges are recorded, revised print-outs are required and in the event of settlement approval, form letters and checks are printed. In addition, it is forseen that additional expenses will arise for xeroxing, mailing, telephone, travel, banking, transcripts and other unavoidable costs incidental to completing these cases. Certain of these costs will recur with the distribution of each installment of the Settlement Fund and can be deducted from the interest earned on those installments.

45. Petitioner has not been reimbursed for any out-of-pocket expenses incurred to date.

D. Retainer Agreements With Clients:

46. Petitioner has with each class representative plaintiff a contingent fee agreement equal to or greater than 25% of any recovery. Petitioner has to date received no legal fees whatsoever in connection with the commencement, prosecution and administration of these cases. Petitioner's entire fee rests upon obtaining a recovery in these cases and upon the amount of that recovery. In this manner, Petitioner has assumed all the risks of litigation with respect to an award of attorney's fee.

E. Request For Fee:

47. In light of all the foregoing circumstances,

Petitioner is requesting that in the event the proposed Settlement is approved as fair, adequate and reasonable, Petitioner be awarded attorneys' fees in an amount equal to 25% of the gross principal Settlement Fund, exclusive of interest,*/ and that the fee not be entirely paid out of the first settlement installment, but be paid proportionately out of each of the five settlement installments as they become due.

48. It is due solely to Petitioner's diligent and timely filing of these actions as national class actions and Petitioner's diligent prosecution of them as class actions that the claims of absent class members - otherwise barred by the statute of limitations - may still be asserted. Moreover, the settlement as proposed assures the absent claimants of a recovery and eliminates the risks inherent in the litigation of the class action issues that the classes may not be upheld.

49. In negotiating the settlement, Petitioner held paramount that the scope of the classes be as broadly defined as in the complaints so that the most claimants possible could share in the settlement. Likewise, Petitioner obtained a settlement covering an unusually large period of 11-1/4 years. Moreover, Petitioner succeeded in giving the best practicable

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*/ Petitioner is not seeking any fee from the interest earned by the Settlement Fund. Thus, in reality, the fee Petitioner is seeking is less than 25% of the total recovery to be received by participating class members.

notice evidenced by the overwhelming response as set forth below.

50. The total number of claims filed by class members is 14,079. The total amount of transactions listed in the claims for the 11-1/4 year period of the settlement is $329,598,877.81.*/ The total dollar amount of transactions unchallenged is $292,298,515.69.*/ Assuming after all challenges are resolved that the total of acceptable transactions approximates $310,000,000, the Settlement Fund, exclusive of interest, represents a recovery of approximately 3.23% and with interest approximately 3.46%.

If the settlement was restricted to the more traditional 4-year period preceding the filing of the Government enforcement action, based on $310,000,000 of acceptable claims, the recovery would approximate 9.08% without interest, and including interest would approximate 9.73%. Excluding 8% Excise Tax, it would approximate 10.58%.

51. These therapeutic results are to be contrasted with what reasonably could have been proposed as a settlement --

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*/ Almost all claimants included in the sum of their transactions an 8% Excise Tax. Accordingly, to determine the true dollar amount of the total transactions involved, 8% thereof should be deducted. This would result in total transactions being approximately $303,230,967.59 and unchallenged transactions being $268,914,634.43. Assuming the total acceptable transactions would then ultimately equal approximately $285,200,000 ($310,000,000 less 8% Excise Tax), the rate of gross recovery, including interest, would be 3.76%.

(a) only published notice be given instead of direct mailed notice to over 89,000 subscribers; (b) that the Notice not contain any reference to the settlement;*/ and (c) that the settlement be limited to accredited central station protective equipment installed or services rendered within the four-year period prior to the institution of the Government enforcement action — in which case the response would have been considerably less and the percentage of recovery enhanced. But this would only be from a statistical point of view. In reality, the proposed settlement and the procedures followed pursuant thereto result in a much broader distribution of the benefits obtained.

52. The majority of class members who filed statements of claim, like the class representatives, were too small to commence litigation on their own behalf. Accordingly these claimants benefitted greatly from these class actions. Many other claimants, particularly banks and ADT's National Accounts,**/ had sufficiently large claims to merit commencement of their own individual actions, as did most of the

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*/ In the National Cast Iron Pipe antitrust cases pending in the Southern District of Alabama, Notice was given of the pendency of national and statewide governmental class actions, without notice of any settlement (no settlement exists in those cases.) Petitioner has been informed that approximately only 3% of the class memberships responded affirmatively to such notice.

**/ i.e., Chase Manhattan Bank; First National City Bank; General Motors Corporation; Ford Motor Company; Great Atlantic and Pacific Tea Company.

plaintiffs who filed the 55 independent non-class actions. Likewise, these large claimants, who could have done something but did nothing, benefitted greatly from these class actions and the proposed settlement.

53. Petitioner urges that the result obtained by reason of the proposed settlement, in light of all the facts and circumstances hereto, is an excellent one. The effective, efficient and economical procedures in the filing and prosecuting of these actions as class actions bespeaks the ability and expertise of the Petitioner.

54. In light of the benefits conferred upon the classes as hereinbefore set forth, in view of the services which Petitioner has performed, in light of the fee agreements of Petitioner with the class representative plaintiffs, both governmental entities and private, and in view of the personal and financial risks which Petitioner undertook to file and prosecute these national class actions, Petitioner respectfully submits that it is fair and equitable and in accordance with established legal pricniples for the Court to approve an award to Petitioner of 25% percent of the gross recovery, exclusive of interest, (and less than 25% including interest on the principal Settlement Fund) which these classes will receive in the event the proposed settlement is approved.

David Berger

Sworn to and Subscribed
before me this 20th day
of April, 1972.

Notary Public

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 28, 1975

Plts. Exh. 5 (45)

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	66 CIV. 4026
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al.	68 CIV. 4028
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC., et al.	68 CIV. 4027
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1479)

AFFIDAVIT IN OPPOSITION TO APPLICATION
BY PARKER, CHAPIN & FLATTAU, ET AL., FOR ATTORNEYS FEES

DAVID BERGER, ESQUIRE, being duly sworn according to law, deposes and says that he is counsel for class representative plaintiffs in the three above-captioned litigation and that he makes this affidavit in response to affidavits filed by Messrs. Stein, Victor and Robinson in support of their application for a share of the attorneys' fee to be awarded by this court from the settlement fund created by Petitioner in these three national class actions.

1. Upon Petitioner's cases being transferred to the Southern District of New York, Petitioner promptly requested that he be placed on the Steering Committee of Counsel for Subscriber Plaintiffs. This request was embodied in a letter dated November 5, 1968, from me to a member of the Troika (Appendix "A-1" hereto). This was acknowledged by the Troika. (Letter of November 22, 1968, attached hereto as Appendix "A-2").

2. With respect to the preparation of the Rule 34 motion for production of documents, the record is clear that petitioner's firm assumed the responsibility for and did prepare the motion for all plaintiffs. See memorandum from H.B. Newberg, Esquire (in Petitioner's firm at that time) dated April 17, 1969: "I have agreed to prepare the Rule 34 motion for circulation to the other counsel." (Memo attached as Appendix "B-1"). That Petitioner's office prepared the motion is evidenced by Mr. Newberg's letter of June 2, 1969, attached hereto as Appendix "B-2".

3. (a) With respect to the opposition to defendants' motion for partial summary judgment, petitioner shared responsibility in preparing the brief and took a major role in such preparation. Annexed hereto as Appendix "C-1" is Petitioner's original draft of the brief circulated among all plaintiff's counsel. A copy of the cover letter forwarding the draft to Mr. Victor is annexed as Appendix "C-2". This draft, in turn,

was circulated among other counsel. (See Mr. Victor's letter of June 21, 1969, annexed as Appendix "C-3"). Petitioner's firm participated with other plaintiffs' counsel in the final draft of the brief. Indeed, Petitioner insisted and persisted, over the objection of other counsel including members of the Troika, that an argument be included that Sections 5(a) and 5(b) of the Clayton Act must be applied independently of each other. Indeed, this legal point was the touchstone upon which this court and later the Court of Appeals rested its favorable decision.

(b) The initial draft of the brief in the Court of Appeals was prepared by agreement by Mr. Hoffman, counsel for a competitor plaintiff. Initially, Petitioner informed a member of the Troika that Petitioner's firm wished "to assist with the preparation of the plaintiffs' brief in the pending appeal." (See letter of January 8, 1970, annexed hereto as Appendix "C-4"). Upon receipt of Mr. Hoffman's draft, Petitioner's firm prepared and sent a five-page letter commenting on the draft, again insisting that the argument of the independent application of Sections 5(a) and 5(b) of the Clayton Act be advanced. A copy of Petitioner's letter is annexed hereto as "Appendix "C-5"). Thereafter, Petitioner's firm collaborated with other plaintiffs' counsel in preparing the final version of appellee's brief.

(c) With respect to the argument in the Court of Appeals, the affidavits of Messrs. Stein, Victor and Robinson

are simply false with respect to their averment that the Troika "had no advance knowledge that Mr. Berger intended to participate..." (Robinson Affidavit, ¶7, pg.7). By letter to the Clerk, U.S. Court of Appeals (2nd Cir.), dated March 6, 1972, with a copy to a member of the Troika, Petitioner informed the Clerk of the Court of Appeals that Petitioner requested permission to make "argument on behalf of my clients in connection with the above captioned appeal, argument being scheduled for March 26, 1970." (Letter annexed as Appendix "C-6"). Moreover, a member of the Troika advised all other Subscriber Plaintiffs Counsel that "...David Berger... has requested permission from the court to argue the case on behalf of his own clients." (See Victor letter of March 12, 1970, annexed hereto as Appendix "C-7"). Accordingly, all plaintiffs' counsel had at least two weeks advance notice that Petitioner would personally protect the interests of his clients and the absent members of the classes by arguing before the Court of Appeals.

(d) Upon receipt of defendants' Petition for Certiorari filed in the United States Supreme Court, Petitioner's firm prepared a 9 page letter outlining the form of Answer to the Petition which Petitioner suggested. The outline was very detailed and was the product of extensive research by Petitioner. A copy of this letter, dated August 14, 1970, is annexed as Appendix "C-8". That Petitioner was a part of a small group of Counsel which prepared the final Answer is evidenced by Mr. Brett's letter of August 19, 1970 (Appendix "C-9") and Mr. Victor's letter of August 25, 1970 (Appendix "C-10") with a hand written

note indicating that Mr. Montague of Petitioner's firm telephoned changes to Mr. Victor on August 28, 1970. Moreover, Mr. Montague attended a drafting session of the Answer held in New York City.

4. Petitioner has never had any agreement nor any understanding with the Troika about sharing of attorney's fees which may be awarded as a result of any recovery in the three national class actions commenced and prosecuted by Petitioner. Nor was Petitioner ever asked to enter into such an agreement. Petitioner did agree to reimburse the Troika on a pro rata basis for any out-of-pocket expenses incurred by the Troika in performing its "liaison" counsel duties. Indeed, Petitioner has done this.

5. With respect to the Troika's averment that it has acted as lead counsel, Petitioner has never recognized the Troika as acting as lead counsel with respect to Petitioner's cases. Petitioner in every aspect of this litigation has undertaken to perform all work necessary for the successful prosecution of these national class actions. Indeed, when Petitioner received a letter dated November 10, 1970 from Mr. Brett advising Petitioner that a "meeting of lead counsel was held last week" of which meeting Petitioner was not notified, Petitioner responded in a letter dated November 16, 1970 (Appendix "D" annexed hereto):

> "I was greatly disturbed and annoyed to learn from your letter of November 10, 1970 that a meeting of "lead counsel" had been held concerning the future progress of these actions and that our office was not apprised of such meeting. As you know,

> we have participated in every phase of this litigation, have attended and contributed to all similar past meetings, and have contributed heavily to the matters completed to date. Without regard to any nomenclature as to "lead counsel", we have always taken an active role in all antitrust litigation in which we participate, especially where our clients, as here, are representative of national classes. I was surprised at your omission to notify us and hope that it was inadvertent. With respect to future meetings, I anticipate that we will be notified."

5. Wherever cooperation among plaintiffs' counsel was called for, Petitioner cooperated. However, at all times Petitioner undertook to prepare and prosecute these class actions on his own. As admitted by the Troika, Petitioner alone prepared, briefed, argued the class action issues. Moreover, Petitioner alone negotiated with defendants the proposed $10,000,000 settlement now before this Court. Petitioner also alone has administered the administration of these class actions and the settlement process. The Troika took no part whatsoever in these significant and important aspects of the class action litigation -- and contributed nothing thereto. The settlement now before this Court as well as the more than 14,000 claims filed herein are all the result of Petitioners foresight and imagination in filing and successfully prosecuting these three national class actions.

6. Indeed, during the prosecution of these actions, certain members of the Troika expressed to Petitioner their hostility toward the class actions and made fun of the enormous undertaking which Petitioner had assumed in attempting to uphold and prosecute these actions as class actions. Indeed in a letter

dated September 17, 1971 to all counsel for subscriber-plaintiffs,*/ a member of the Troika candidly characterized the class actions as a "considerable stumbling block":

> "...It would appear certain that the class action settlements remove a considerable stumbling block to the possibility of disposition of our own respective cases upon satisfactory terms. ..." [Emphasis added].

More revealing of the hostility of the independent subscriber plaintiffs to the class actions is expressed in a letter from Haverstock, Gray Plant, Mooty and Anderson, Esq. (by Edward J. Callahan, Jr.) to Mr. Brett dated November 19, 1970*/ in which counsel for a litigating subscriber plaintiff states:

> "Meanwhile, at least for the majority of plaintiffs, a determination of the class action question would be very helpful. Bob Donnelly told me a week or so ago that after the defendants original letter on the subject to the judge, nothing whatsoever has been done. I'm not sure what other plaintiffs can do to speed this part up. But from the point of our clients, a ruling in favor of the defendants on the question raised there would help clear matters up." [Emphasis added]

Moreover, with respect to Petitioner's initial motion to have these cases declared valid class actions, a member of the Troika (Mr. Brett) responded to the Court as follows:

"Mr. Brett: Yes, your Honor. Those are a very limited application in terms of concern among the subscriber plaintiffs, and there are in court today Mr. Montague and Mr. Joseph, who are the counsel involved in the class action

---

*/Because this letter reveals possible strategy among remaining plaintiffs' counsel, Petitioner, as a matter of courtesy, is not affixing the letter to this Affidavit.

cases, if your Honor please, Mr. Montague is right here."
(Hearing of June 17, 1969, Transcript at p.47).

David Berger

Sworn to and Subscribed
before me this 23rd day
of May, 1972.

Notary Public

ALBERTA C. C. MEWLIN
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires April 22, 1976

November 5, 1968

Ira M. Millstein, Esq.
Weil Gotshal & Manges
767 Fifth Avenue
New York, N. Y. 10022

Re: Central Station Protection Service Antitrust Litigation
(Burglar Alarms, Etc.)

Dear Ira:

This will acknowledge receipt of your letter of October 28 sending a report of the meeting of plaintiffs' counsel held in your offices on October 24 in connection with the above-noted matter.

Because of important prior commitments, I was unable to join you and the group of plaintiffs' attorneys at this meeting. I do wish, however, to request that my name be added to the Steering Committee for the Subscribers, since our office is apparently the only one representative of governmental bodies generally in this litigation. As you may know, there were instituted here in the Eastern District of Pennsylvania, class actions in behalf of governmental bodies similarly situated.

I should also like to have my name added to the Subcommittee on Discovery. Since the actions which we commenced have only been recently filed, we have not yet been able to conduct discovery because of the various court stay orders pending the ruling of the Judicial Panel.

EXHIBIT A-1

The matters in your recent letter of October 28 will be further reviewed by our office and we will forward any suggestions we may have to you at an early date. Because of the class action nature of the proceedings which we initiated in the Eastern District of Pennsylvania, it will be necessary at an early stage of the proceedings in New York to resolve these class action issues.

With all best wishes.

Sincerely,

DB:ir

David Berger

A-2

WEIL, GOTSHAL & MANGES
767 FIFTH AVENUE · NEW YORK, N.Y. 10022
PLAZA 8-7000 CABLE ADDRESS "WEGOMA"

HORACE S. MANGES
BENEDICT ARELOW
GABRIEL KASLOW
JOHN M. LEWIS
JESSE D. WOLFF
ARTHUR M. ANSCHMANN
EDWARD C. WALLACE

ROBERT TODD LARK
IRA M. MILLSTEIN
MARTIN D. GINSBURG
PHILIP T. KAPLAN
MICHAEL A. STANTON
ARTHUR F. JACOBS

MARSHALL E. BERGER
WILLIAM JAMES LUDIE
ARTHUR F. ANGELMAN
NATHAN COHEN
MYRON J. MEADOW
STEPHEN E. JACOBS
GERALD D. MCGRAHAN
IRVING SCHEN
THOMAS P. CULLINAN
DANIEL SUSMAN
LEO L. SCHMOLKA
CARL A. SCHWARTZ, JR.
CARL D. LOSELL
DONALD J. WILLIAMSON
CLIFFORD PIER
A. PAUL VICTOR
STEPHEN F. SCHWARTZ

STUART M. ROSEN
SAMUEL M. LAITMAN
RONALD F. DAVIS
STEPHEN H. COOPER
LEONARD J. LEVY
STUART D. ARES
BURTON SILVERSTEIN
PETER N. GILBERT
MARK A. WEDEL
PETER D. STANDISH
ROBERT E. SCHUR
DAVID H. GRIFF
ARTHUR J. LEVY
MARTIN D. ARGUS
JEROME OSTROV
ROBERT L. ASTEMAN

SYLVAN GOTSHAL 1931-1968
FRANK L. WEIL 1931-1957

EUROPEAN OFFICE
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STANLEY COHEN
RESIDENT PARTNER

November 22, 1968

David Berger, Esq.
Cohen, Shapiro, Berger,
Polisher and Cohen
Twenty-Second Floor
Philadelphia Saving Fund Bldg.
Philadelphia, Pa. 19107

Re: Central Station Protection Service
Antitrust Litigation (Burglar Alarms, Etc.)

Dear David:

This is in response to your letter concerning your service upon the Steering Committee and Discovery Subcommittee in the above captioned matter, referred to in my letter of October 28 to all counsel for plaintiffs. I am pleased to add your name to our ranks, the more who want to work the better. I am sure those members of the Discovery Subcommittee with whom you will be serving will be delighted to have your services.

For your information please note that the Discovery Subcommittee has presently scheduled a meeting for Tuesday, November 26, at the office of Herbert Robinson, Esq., Liebman, Eulau, Robinson & Perlman, 32 East 57th Street, New York. I believe the meeting is to start at 10:00 A.M., but would appreciate your calling A. Paul Victor of my office to confirm that fact.

I look forward to seeing you. Best regards.

Sincerely,

IMM/ami
cc: Members of Steering Committee
and Discovery Subcommittee

DB

B-1

MEMORANDUM

TO: David Berger
FROM: Herbert B. Newberg (HBN)
RE: Burglar Alarms

April 17, 1969

I attended a meeting of all plaintiffs' counsel in New York yesterday, April 16, 1969.

It was decided that a standard set of interrogatories would be filed and that a simple Rule 34 Motion would be filed for everyone, to request particular competitive reports and contract data for all plaintiffs, nationwide.

A follow up meeting of all plaintiffs' counsel has been set for May 14th in New York at 2:00 o'clock pm.

I have agreed to prepare the Rule 34 motion for circulation to the other counsel.

You will recall in this action that the United States Supreme court affirmed a conviction of antitrust violations against the defendants in the burglar alarms case.

Accordingly it was decided that since we have the benefit of a governmental trial, discovery should be kept to a simple level and an early trial date should be sought. The Federal Government has a civil action now pending in New York which has been consolidated for pre-purposes with other triple-damage actions. The Federal Government was represented at our New York meeting and he agrees that ours is good strategy.

The Federal Government currently has pending a motion for summary judgment on the basis of collateral estoppel which it plans to move forward as soon as possible.

I mentioned to those in attendance at the meeting that Philadelphia has national class actions both public and private which Philadelphia intends to press in the near future for court decision.

HBN:mr

B-2

June 2, 1969

Herbert Robinson, Esquire
Liebman, Eulau, Robinson & Perlman
32 East 57th Street
New York, New York 10022

Re: Grinnell Cases

Dear Herb:

Enclosed please find a revised draft of Plaintiffs' Consolidated Motion for Order of Production of Documents in the Grinnell cases.

I do not have knowledge of all of the captions or of all of the names of the plaintiffs' attorneys in whose behalf this Rule 34 Motion will be filed. I presume that since the same information will be included on the consolidated interrogatories, that the discovery sub-committee does have this information among its members. Accordingly, if you would arrange to have mailed to me the information concerning the relevant captions and list of attorneys with their telephone numbers, I shall be happy to prepare the motion in final form. Of course, any further comments by the discovery sub-committee will be reflected in the final form. In the alternative, as time is an important factor then perhaps the final form of the Rule 34 Motion should be typed in New York City and filed and distributed from there.

There is a possibility that I personally will not be able to attend the meeting among plaintiffs' counsel scheduled for Thursday, June 5 at 10:00 a.m. In that event I will have someone else in our office attend the meeting.

Hebbert Robinson, Esquire June 2, 1969

Please telephone me immediately upon receipt of this letter and advise whether you wish us to provide sufficient copies of the Revised Rule 34 Motion for all plaintiffs expected to attend the meeting on Thursday. By copy of this letter to all members of the discovery sub-committee I am requesting any comments they may have regarding the Rule 34 Motion.

Sincerely,

David Berger
Herbert B. Newberg

HBN/mc

Encl.

LAW OFFICES
CURTIS, SHAFFER, BERGER, FOUSHEE & COMLY
PHILADELPHIA SAVING FUND BUILDING
PHILADELPHIA, PA. 19107

DRAFT

C-1

RE BURGLAR ALARMS TREBLE DAMAGE ANTITRUST LITIGATION -- ARGUMENT CONTRA DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (STATUTE OF LIMITATIONS).

THE GOVERNMENT CIVIL CASE CONTINUED TO PEND, FOR PURPOSES OF §5(b), CLAYTON ACT, AT LEAST UNTIL THE DISTRICT COURT'S FINAL DECREE OF JULY 11, 1967 WAS ENTERED.

Defendants' position that the Government civil suit against the defendants ceased to pend when the United States Supreme Court handed down its Opinion of June 13, 1966 or issued its Mandate of July 11, 1966 is contrary to the letter, spirit and case law construction of Section 5(b) of the Clayton Act (amended, 1955) (15 U.S.C. §16(b)). That section provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

The section is clear in its intent in that it talks only in terms of the "pendency" of "any civil or criminal proceeding ... instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws. ..." Defendants, in what appears to be desperation, suggest a strained and unreasonable construction of Section 5 which would dichotomize the pendency of a government civil action into what defendants' self-servingly call (1) "the enforcement" portion of the action and (2) the "remedy" or "relief" portion thereof. Applying their spurious theory to the case sub judice, defendants suggest that the government's civil action against defendants Grinnell Corporation, et al. "to prevent, restrain or punish violations" of the Sherman Act ceased to pend upon the Supreme Court's decision of June 13, 1966 and its mandate pursuant thereto which affirmed the judgment of the District Court and reversed the decree, remanding the same to the District Court for further hearing on the nature of the relief consistent with the views expressed in the Opinion of the Court [U. S. v. Grinnell Corporation, 384 U.S. 563, 16 L. ed. 2d 778 (1966)]. Defendants advance this theory despite the established principle that "The proper disposition of antitrust cases is obviously of great

public importance, and their remedial phase, more often than not, is crucial." United States v. DuPont De Nemours & Co., 366 U.S. 316, 323, 6 L. ed. 2d 318, 323 (1961). Defendants also appear to overlook the Supreme Court's direction to the District Court in U. S. v. Grinnell Corp., supra, that the relief granted should specifically relate to the violations practiced.

> "The Government objects, as do the defendants, to the broad and generalized terms of the restraining order. They properly point out, as we emphasized in Schine Theatres v. United States, supra, 334 U.S. at 125-126, 92 L. ed. at 1256-1257, that the precise practices found to have violated the Act should be specifically enjoined. On remand, we suggest that that course be taken." United States v. Grinnell Corporation, supra 384 U.S. at 579-580, 16 L. ed. 2d at 791 (1966). [Emphasis supplied].

Beginning with the Supreme Court's decision in New Jersey Wood Finishing Company v. Minnesota Mining and Manufacturing Company, 381 U.S. 311, 14 L. ed. 2d 405 (1965), Section 5(b) has been given renewed vitality and significance in the scheme of effective antitrust enforcement. In the 3M case, the Court emphasized that "Congress has expressed its

belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." 381 U.S. at 318, 14 L. ed. 2d at 411. With this Congressional intent in mind, the Court ruled that a proceeding before the Federal Trade Commission is a "civil or criminal proceeding ... instituted by the United States" which suspends the statute of limitations during its pendency. Thus, the Court gave a liberal rather than a restrictive construction to the phrase "civil or criminal proceeding ... instituted by the United States."

Following the 3M case, the Court in Leh v. General Petroleum Corporation, 382 U.S. 54, 15 L. ed. 2d 134, Reh. den. 382 U.S. 1001, 15 L. ed. 2d 491 (1965), gave a liberal rather than restrictive construction to the phrase "based in whole or in part on any matter complained of." In determining the effect to be given to Section 5(b), the Court held:

> "Rather, effect must be given to the broad terms of the statute itself -- 'based in whole or in part on any matter complained of' (emphasis added) -- read in light of congress' 'belief that private antitrust litigation is one of the surest weapons for effective law enforcement of the anti-trust laws.; 381 U.S. at 318, 14 L. ed. 2d at 411.

> Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief. But the courts must not allow a legitimate concern that invocation of Section 5(b) be made in good faith to lead them to a niggardly construction of the statutory language here in question." 382 U.S. at 59, 15 L. ed. 2d at 138.

In accordance with the Supreme Court's pronouncements in the 3M and Leh cases, the Third Circuit, in State of New Jersey v. Morton Salt Co., 387 F. 2d 94 (3rd Cir. 1967), gave the following guidelines for the construction of Section 5(b) of the Clayton Act:

> "The Congressional history, as reflected in the Minnesota Mining case, gives further support to the view that the tolling provision was enacted for the benefit of private parties who were injured. This factor plus Congressional policy suggest most strongly that the tolling provision, if of doubtful meaning, should be interpreted in a way which will permit a determination on the merits of private claims in this area." New Jersey v. Morton Salt Co., supra, 387 F. 2d at 97. [Emphasis supplied].

Dispite the plain language of Section 5(b) and the congressional intent behind it and the judicial interpretation and construction of it as expressed in 3M, Leh and Morton

Salt Co. cases, defendants rely on two 1956 cases to place a restrictive construction upon the word "pendency," i.e. Grenge v. Twentieth Century Fox Film Corporation, 232 F. 2d 325 (7th Cir. 1956); and Tague v. Balaban, 146 F. Supp. 356 (N.D. Ill. 1956). Both of these cases grew out of the Government civil proceedings involving the movie industry, U. S. v. Paramount Pictures, Inc., 334 U.S. 131, 92 L. ed. 1260 (1948). Both the Grenge and the Tague cases dealt with Section 5 of the Clayton Act prior to its 1955 Amendment and rested upon the premise (now erroneous) that the prima facie evidence provision of Section 5 was inexorably intertwined with the tolling provision. Thus in Tague, the court held that the government civil proceeding ceased to pend, and the statute of limitations ceased to be suspended, when a February 8, 1950 decree in the Government proceeding was entered and rehearing thereon was denied by the Supreme Court, because at that time, there was a decree which could be used as prima facie evidence in the private suit. The reasoning of the court in Tague was as follows:

> "Therefore, a Government suit ceases to pend, for purposes of Section 5, once there has been a final adjudication of some violation of the anti-trust laws

which can be evidence to support allegations of the same alleged violations in a suit by a private plaintiff. This is especially so since it is the adjudication of a violation, and not the type and extent of relief granted, that is evidentiary value to a private plaintiff in a subsequent suit." Tague v. Balaban, supra, 146 F. Supp. at 360. [Emphasis added].

In Tague, as well as in Grenge, the court relies upon a construction of Section 5 which makes the statute of limitations tolling provision dependent upon the prima facie evidence provision. However, both the 3M and Leh cases, supra, have overturned this construction and held that Sections 5(a) and 5(b) are not interrelated, but apply independently of each other. In the 3M case, supra, the Court held:

"In our view, therefore, the two sections are not necessarily coextensive; they are governed by different considerations as well as congressional policy objectives. This makes §5(b) readily severable from §5(a), is inapplicable to Commission proceedings ... that conclusion would be immaterial in our consideration of §5(b) and §4(b)." 381 U.S. at 318, 14 L. ed. 2d at 410-411. [Emphasis supplied].

EVEN IF WE assume arguendo that §5(a)

The Court in 3M continued:

"... In this connection, and of crucial significance, is the fact that the potential advantages available to

such litigants because of §5(b) reach far beyond the specific and limited benefits accruing to them under §5(a)." 381 U.S. at 320, 14 L. ed. at 412.

Accordingly, the Tague and Grenge cases are no longer of any significance in that the rationale behind their conclusions has become obsolete.

Dickinson, Inc. v. Kansas City Star Company, 173 F. Supp. 423 (W.D. Mo. 1959), a decision prior to the 3M and Leh cases, espouses defendants' position as untenable. In Dickinson, the government simultaneously commenced a criminal and a civil action against defendants for violations of Section 2 of the Sherman Act. The criminal action resulted in "guilty" verdicts. The civil action ceased to pend when defendants entered into consent decrees five months after the criminal suit terminated. The court ruled that the government suit continued to pend AND suspend the running of the statute of limitations until the time the consent decrees in the civil actions were entered. It further ruled that the criminal suit could be used as prima facie evidence by the private plaintiff, even though the plaintiff commenced his action more than one year after the criminal suit ceased to pend.

The Dickinson case was approved in State of Michigan v. Morton Salt Company, 259 F. Supp. 35 (D. Minn. 1966) affirmed sub nom. Hardy Salt Co. v. State of Illinois, 377 F. 2d 768 (8th Cir. 1967), which held that the pendency of a government civil suit suspended the statute of limitations irrespective of the fact that the civil suit was decided solely upon the record of a previous companion criminal suit against the same defendants. In so holding, the court stated:

> "Because the Government civil action here produced no new testimony, being submitted on the record made in the criminal case, defendants maintain that the fruits of the Government action were available to plaintiffs following completion of the criminal case. It is suggested that they could well have initiated their review and assessment of the Government case and their respective claims during the year following termination of the criminal action. This argument suffers from hindsight to the extent that private plaintiffs may not have been aware that the civil action would produce little else in the way of discovery, documents, testimony or exhibits. Additionally, questions may have been raised in the civil suit which had not been previously determined gy the criminal action.. If this were so, then the private actions could conceivably progress at a faster pace." 259 F. Supp. at 52. [Emphasis supplied].

In light of the foregoing, defendants' argument that the Supreme Court decision of June 13, 1966, U.S. v. Grinnell Corp., supra, ended the pendency of the government proceeding, despite the fact that the case was remanded and further evidence was presented to the district court at trial, must be rejected. Rather, July 11, 1967, the date on which the final decree was entered by the District Court, must be considered the date upon which the Government proceeding ceased to pend.

Even assuming arguendo that a decree which may be used as prima facie evidence under §5(a) is automatically a decree which ceases the pendency of the action under §5(b), the facts of the present case dictate the conclusion that the government case against the defendants continued to pend at least until the district court's decree of July 11, 1967 was entered. It is clear, as the defendants recognize, that the July 11, 1967 decree may constitute prima facie evidence.

The Supreme Court, in its opinion, directed that "the precise practices found to have violated the Act should be specifically enjoined. On remand we suggest that that course be followed." U.S. v. Grinnell Corp., supra, 384 U.S.

at 579-580, 16 L. ed. 2d at 791. Furthermore, in discussing the means of the §2 violations, the Court stated:

> "Two of the means by which ADT acquired and maintained its large share of the market are the requirements that subscribers sign five-year contracts and the retention by ADT of title to the protective services equipment installed on a subscriber's premises. On this record it appears that these practices constitute substantial barriers to competition and the the relief against them is appropriate. The pros and cons are argued with considerable vehemence here. Again, we cannot resolve them on the record. The various aspects of this controversy must be explored by the District Court and suitable protective provisions included in the decree. ..." 384 U.S. at 578, 16 L. ed 2d at 790, 791 [Emphasis supplied].

Accordingly, the Supreme Court recognized that further adjudication was necessary with respect to two very important aspects of the monoply. It recognized that the effect of these practices could not be determined on the present record. Further exploration into this "controversy" was done by the district court in the form of depositions, documentary evidence, two days of trial hearings and final argument, all of which resulted in the final decree of July 11, 1967.

That defendants recognize that the Supreme Court decision, order and mandate did not cause the government

proceeding to cease pending is clear from their briefs and letters submitted to the district court in the government proceeding and to this Court in the present case. In a letter to Judge Wyzanski dated May 25, 1967, counsel for defendant ADT, obviously with an eye toward avoiding any prima facie effect of the decree in private treble damage actions, stated:

> "Nothwithstanding these and other considerations, if the Government will agree to certain consent language previously proposed by the defendants or if the Court were to adopt language indicating that the Final Judgment to be entered is by consent of the defendants without additional findings of fact or conclusions of law, ADT would agree to accept without objection what we understand to be the substance of your proposed language."

Likewise, Defendant Grinnell, in its Memorandum On Remand, requested the Court to include in the final decree language which would indicate that the decree was a consent decree as to Grinnell so that the decree could not be used as prima facie evidence in private treble damage actions against Grinnell. Counsel for Grinnell recognized:

> "In the instant case, however, the Supreme Court's majority opinion states that 'the precise practices found to have violated the Act should be specifically enjoined" (384 U.S. at pp. 579-80). This language may be used.

hereafter to support an argument that anything now enjoined is a 'precise practice' which this Court 'found to have violated' the Sherman Act, and that the final decree creates a prima facie case to that effect."

From the decree of July 11, 1967, it is obvious that Judge Wyzanski disagreed with defendants' position.

Perhaps more revealing are the statements of defendants in their briefs in these cases in support of their motions to strike from the complaints references to the government proceedings in U. S. v. Grinnell Corporation, 236 F. Supp. 244 (D. R. I. 1964), aff'd in part and rev'd in part, 384 U.S. 563 (1966):

" ... Here plaintiffs attempt to rely upon a 1964 District Court judgment which was not wholly affirmed and which was superseded by a final decree not entered until July, 1967." Brief of ADT at p. 4.

"Under the provisions of §5(a), it is only the final decree itself which may be used as prima facie evidence, and then only with respect to those issues which were actually and necessarily decided by the judgment and which establish matters of ultimate fact in the private suit. The various opinions, decisions or changes which led up to entry of the final judgment are not themselves evidence, and are not properly part of the complaint." Memorandum of Grinnell Corporation, at p. 5.

Grinnell took the position that plaintiffs "may refer to the final decree therein and state that they intend to use it as prima facie evidence in these proceedings to the extent permitted by Section 5(a). ..." (Memorandum of Grinnell Corporation, at p. 4).

Aside from the defendants' own recognition, it is clear that the final decree of July 11, 1967 may be used as prima facie evidence in these private treble damage suits. In Hanover Shoe, Inc. v. United Shoe Machinery Corporation, 245 F. Supp. 258 (M.D. Pa. 1965), aff'd. 392 U.S. 481, 20 L. ed. 2d 1231, Reh. den. 393 U.S. 901, the Court held that a decree setting forth the relief granted was properly admissible under §5(a) of the Clayton Act as prima facie evidence in a private action:

> "If the lease-only system was not a monopolistic practice by the aid of which United Maintained is monopolistic position, it would have been unnecessary for the court to order its cessation since it is a practice which could exist independent of the other lease provisions and practices." 245 F. Supp. at 268.

Likewise, in Elyria-Lorain Broadcasting Co. v. Lorain Journal Company, 298 F. 2d 356 (6th Cir. 1961), an injunctive decree in a government antitrust proceeding was permitted to be

introduced as prima facie evidence under Section 5(a), Clayton Act:

> "...[W]here an injunction is granted there must have been a determination of present damage." 298 F. 2d at 358.

In Fifth and Walnut, Inc. v. Loew's Incorporated, 176 F. 2d 587, 593 (2nd Cir. 1949) (another of the "movie cases"), the Court held that a Supreme Court decree was not final and could not be introduced as prima facie evidence under old §5, Clayton Act, where the "Supreme Court has accepted the basic findings of illegality and has sent the cases back for more complete relief; in short that the error found was of the nature to make a final result more favorable that otherwise to the plaintiffs' position."

Defendants rely on Grenge v. Twentieth Century Fox Film Corporation, 232 F. 2d 325 (7th Cir. 1956). In addition to the reasons previously set forth herein, those cases are not applicable to the present cases on their facts. In the Tague case, the district court held that the 1950 decree against defendant Loew's was a final decree, even though it directed the parties to submit plans for divorcement and divestiture of Loew's exhibitor holdings in order to comply with the Supreme Court's 1948 decision. The decree relied upon by the plaintiff in Tague, was a 1952 decree against Loew which

was handed down pursuant to the 1950 decree and the greater part of which was the parties' plan for divorcement and divestiture. 146 F. Supp. at 359-360.

In the cases at bar, a reading of the district court's July 11th 1967 decree in the related Government proceeding clearly shows that the decree dealt with much more than the parties' plan of divestiture. The Court set forth in the decree itself that the decree was only issued after the Court had "fully considered" the earlier record of the case, including the evidence, and "all aspects of the decree as to which the Supreme Court directed further inquiry on remand and as to which the parties had reached no agreement.

In the Grenge case, the Court held that the government proceeding continued to pend up to the time the court entered a remand decree which "for the first time determined that the vertical integrations were active aids to the conspiracy theretofore determined and were therefore violations of the act." 232 F. 2d at 333. Again, the "relief" aspect of the decree which the Court, by dicta, indicated would not continue to pend the action, was the same as that portion of the decree involved in the Tague case.

If anything, the facts of the Grenge case support

the conclusion in this case that the government proceeding here continued to pend until the decree on remand was entered on July 11, 1967. For as in Grenge, the district court, after remand, for the first time determined if and to what extent the defendants' practices of requiring subscribers to sign five-year contracts and the retention by ADT of title to the protective services equipment installed on the subscriber's premises constituted substantial barriers to competition.

This Court's Pre-trial Order and conclusion in Gottesman v. General Motors Corporation, Civil Action No. Civ. 121-251 (S.D.N.Y.), (Pretrial Order filed March 18, 1963) also supports plaintiffs' position that the Government's proceedings here pended until July 11, 1967, the date of the decree on remand. In Gottesman, The district Court entered a Judgment on December 9, 1954 dismissing the Government's claims of violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. On June 3, 1957, the Supreme Court sustained the Government on the Section 7 violation and expressly did not rule upon Sections 1 and 2 of the Sherman Act. The Supreme Court issued a mandate on June 16, 1957 stating that the judgment was reversed and the cause remanded for further hearing on the question of appropriate relief.

Upon remand, the District Court entered two separate judgments on November 17, 1959, one judgment vacating its original judgment only as it dealt with Section 7 of the Clayton Act, decreeing that defendants had violated Section 7 and providing the appropriate relief. The second judgment of November 1957 stated that previous decree dismissing the Sherman Act Sections 1 and 2 claims remained untouched. From the judgment dealing with Section 7, the defendants appealed. On May 22, 1961, the Supreme Court vacated that judgment and remanded the case for further proceedings consistent with its opinion as to the relief to be granted. On March 22, 1962, the District Court, on remand, entered the final judgment. In the ensuing private antitrust action that followed, the Court held that the Government suit continued to pend until March 1, 1962, the date when the district court, upon remand, entered the final judgment. Thus, although after the Supreme Court's second remand of the government proceeding all that was left for the district court to conduct was further proceedings consistent with the Supreme Court's opinion as to the relief to be granted, it was held that the action continued to pend after the Supreme Court's determination, and until the district court entered its final decree.

Conspicuously absent from the Court's Pre-Trial Order of March 18, 1963 in Gottesman is any distinction between an adjudication of a violation and the granting of relief. Defendant's assertion that the only reason the government action continued to pend up to the March 1, 1962 remand order is because until that time there was no"'piece of paper called a final judgment as to which the appellate process had been exhausted'" tends to make a mockery of the Court's Pre-trial Order in Gottesman. Defendants base this assertion on the fact that the Supreme Court on the second appeal "vacated" the judgment. However, it is clear from a reading of the Supreme Court's opinion in United States v. DuPont DeNemours & Co.*, 366 U.S. 316, 6 L. ed. 2d 318(1961), that the Supreme Court made a final adjudication that there was a violation of §7 of the Clayton Act, and that the district court had to determine only the equitable relief necessary. In fact, the only question before the Supreme Court on the second appeal was the "adequacy of relief allowed by the District Court." 366 U.S. at 326, 6 L. ed. 2d at 325. And upon the second remand, the only duty of the district court was to fashion a decree for complete divestiture by the defendant of its stock in General Motors. In this light, defendants'clinging to the

* The government proceeding relevant to the Gottesman case.

to the Supreme Court's word "vacated" demonstrates the inherent weakness of defendants' contention.

In light of the foregoing, it is clear that Government civil proceeding entitled United States v. Grinnell Corporation, et al. continued to pend, within the meaning of §5(b) of the Clayton Act, until the decree on remand was entered by the District Court on July 11, 1967, and accordingly, that the statute of limitations for private treble damage actions based in whole or in part on the Government proceeding was suspended for one year thereafter, /at least until July 11, 1968.

July 18, 1969

A. Paul Victor, Esquire
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Re: Grinnell Cases -- Brief Contra Defendants' Motion for Partial Summary Judgment (Statute of Limitations)

Dear Paul:

Enclosed please find six copies of a draft of our portion of the brief concerning July 11, 1967 as the date when the government action in the above cases ceased to pend. Although the argument is set forth under one argument heading, as a matter of style you may want to break down this portion of the argument into two or three separate argument headings. You will also note that we did not go into detail with reference to the "movie" cases in that we felt that they can be distinguished on their merits.

If you have any questions whatsoever, please contact us. We will see you next week concerning the final draft of the brief.

Sincerely yours,

Herbert B. Newberg
H. Laddie Montague, Jr.

HBN:HLM,Jr./th

Enclosures

EXHIBIT C-2

C-3

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STANLEY COHEN
RESIDENT PARTNER

July 21, 1969

Gentlemen:

Attached for your consideration is a copy of the draft statute of limitations brief which I received at 3:45 this afternoon from Herb Newberg and Laddie Montague.

Due to other commitments and time problems, the best time to have our drafting session with respect to this draft and Herb Robinson's affidavit will be at 2:00 P.M. on Wednesday, July 23, at this office. I think we should be prepared to work as long as necessary to get this brief into final shape, as I do not expect there will be sufficient time for us to work on it together subsequent to Wednesday.

Sincerely yours,

WEIL, GOTSHAL & MANGES

By Paul
A. Paul Victor

APV:jaw
Enclosure

cc: Herbert Robinson, Esq.
Max Wild, Esq.
Barry Brett, Esq.
Glen Kanwit, Esq.
Herbert B. Newberg, Esq.

EXHIBIT C-3

January 6, 1970

A. Paul Victor, Esquire
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Re: Burglar Alarm Antitrust Cases

Dear Paul:

This is merely to remind you that we would like to assist with the preparation of the plaintiffs' brief in the pending appeal in the above action.

Also, as I told you at the last meeting of plaintiffs' counsel, we are willing to supply man power for reviewing ADT's records for the preparation of the answer to interrogatory no. 19.

Looking forward to hearing from you concerning both of the above matters.

Sincerely yours,

COHEN, SHAPIRO, BERGER, POLISHER and COHEN

H. Laddie Montague, Jr.

HLM,Jr./th

cc: Barry J. Brett, Esq.

EXHIBIT C-4

C-5

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February 25, 1970

A. Paul Victor, Esquire
Weil, Gotshal and Manges
767 Fifth Avenue
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Re: Burglar Alarms Antitrust

Dear Paul:

The following are our comments concerning the draft of the brief for plaintiffs -- appellees involving the statute of limitations issue in these cases:

1. Pages 24 and 25 of the Draft Relating to the Quotations in Defendants' Brief from the Legislative History:

We fully agree that the defendants have misconstrued and misused the language contained in the legislative history, but we think the present brief, on page 25, misstates the congressional intent behind the 1955 amendment. Accordingly we suggest that the following language be inserted in lieu of the paragraph beginning on the bottom of page 24 and carrying over to page 25 of the draft brief:

In support of their "liability-remedy" distinction with respect to suspension of the statute of limitations, defendants quote selected language from the Senate Judiciary Committee Report which, defendants contend, illustrates that Congress, in amending §5(b), did not wish to unduly prolong the suspension of the statute of limitations. Defendants then argue that the "liability-remedy"

distinction coincides with and furthers this congressional intent.

However, defendants seriously misconstrue the congressional intent by relying on language taken out of context. Set forth below is the full paragraph only partically quoted by defendants (that portion which was not quoted by defendants being underlined):

> "While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is condutive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued to which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceeding, he would be required to bring his action either (a) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued." S. Rep. 619, in U.S. Code Cong. & Adminis. News. 84th Cong., 1st Sess. 2333 (1955).

Prior to the 1955 amendment, §5 provided that the applicable state statute of limitations was suspended by an intervening government proceeding and that the statute of limitations continued to run after the government proceeding ceased to pend. Gordon v. Loew's Incorporated, 247 F.2d 451, 458 (3rd Cir. 1957); Momand v. Universal Film Exchanges, 172 F.2d 37 (1st Cir. 1949), cert. den. 336 U.S. 967, reh. den. 337 U.S. 934, reh den. 337 U.S. 961. The above-quoted language was Congress' instruction that the pre-1955

suspension rule would not continue, but rather that a private plaintiff's statute of limitations would be four (4) years or, in the alternative, one (1) year after the government proceeding ceased to pend, but not four (4) years plus the pendency of the government proceeding.

2. We Strongly Urge that the Following be Inserted, Probably at the End of the Argument ending on Page 23 of the Draft:

The dicta in the Grengs and the Tague cases, relied upon by defendants, dealt with Section 5 of the Clayton Act prior to its 1955 Amendment and rested upon the premise (now erroneous) that the prima facie evidence provision of Section 5 was inexorably intertwined with the tolling provision. The reasoning behind the court's dicta in Tague was as follows:

> "Therefore, a Government suit ceases to pend, for purposes of Section 5, once there has been a final adjudication of some violation of the anti-trust laws which can be evidence to support allegations of the same alleged violations in a suit by a private plaintiff. This is especially so since it is the adjudication of a violation, and not the type and extent of relief granted, that is evidentiary value to a private plaintiff in a subsequent suit." Tague v. Balaban, supra, 146 F. Supp. at 360. [Emphasis added].

In Tague, as well as in Grengs, the court relied upon a construction of Section 5 which made the statute of limitations tolling provisions dependent upon the prima facie evidence provision. However, both the 3M and Leh cases, supra, rejected this construction and held that Sections 5(a) and 5(b) are not coextensive, but apply independently of each other. In the 3M case, supra, the Court held:

> "In our view, therefore, the two sections are not necessarily coexistensive; they are governed by different considerations as well as congressional policy objectives. This makes §5(b) readily severable from §5(a). Even if we assumed arguendo that §5(a) is inapplicable to Commission proceedings ... that conclusion would be immaterial in our considerations of §5(b) and §4(b)." 381 U.S. at 318, 14 L. ed. 2d at 410-411. [Emphasis supplied].

The Court in 3M continued:

> "...In this connection, and of crucial significance, is the fact that the potential advantages available to such litigants because of §5(b) reach far beyond the specific and limited benefits accruing to them under §5(a)." [emphasis added] 381 U.S. at 320, 14 L. ed at 412.

Likewise, in the recent case Maricopa County v. American Pipe and Construction Co., 303 F. Supp. 77 (D. Ariz. 1969), the court recognized that "the 'complimentary' and togetherness construction given Clayton §§5(a) and 5(b) ... was discarded and overruled in Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co. ..." 303 F. Supp. at 84.

Accordingly, although a government proceeding would be considered to pend until at least a judgment capable of being used under §5(a) is rendered, §5(b) goes beyond §5(a) time-wise with its tolling provisions. As the 3M case makes clear, "...the textual distinctions as well as the policy basis of §5(b) indicate it was to serve a more comprehensive function [than §5(a)] in the congressional scheme of things." 381 U.S. at 319, 14 L. Ed. 2d at 411. For example, where the government brings both a criminal and a civil action for the same antitrust violations, and the criminal action is concluded with a judgment that is prima

facie evidence under §5(a) while the civil action continues to pend, the statute of limitations continues to be tolled by that pending civil action. Dickinson, Inc. v. Kansas City Star Company, 173 F. Supp. 423 (W.D. Mo. 1959); accord, Maricopa County v. American Pipe and Construction Company, supra. See this brief, infra, pp. 29 and 30.

3. The foregoing are the two major revisions which we feel must be made in the brief. In addition we have the following minor suggestions.

a. The brief refers to the government case either as "government antitrust enforcement action" or "government enforcement proceeding". We feel that the word "enforcement" should be omitted in that it seems to give recognition to the defendants' "liability-remedy" theory.

b. On the top of page 6, phrase (4) should be revised to read as follows:

(4) enumerating specific practices found to have violated the Sherman Act and enjoining those practices, some of which had not previously been enjoined,

c. On page 13, immediately following the phrase ending with footnote number 3, the following should be inserted:

there was no final declaration as to the specific actions of the defendants that violated the antitrust laws;

As I mentioned to you over the phone, I am planning to attend the meeting of counsel to be held on March 3. Looking forward to seeing you then.

Sincerely yours,

COHEN, SHAPIRO, BERGER,
POLISHER and COHEN

H. Laddie Montague, Jr.

HLM,Jr./th
cc: Barry J. Brett, Esq.

C-6

March 6, 1970

Clerk, U. S. Court
of Appeals
for Second Circuit
United States Court House
Foley Square
New York, New York 10007

Re: Hans Togs, Inc., et al. v. Grinnell Corporation, et al., Docket Nos. 33427, 34439, 34529 and 34541

Dear Sir:

Please be advised that I represent the plaintiffs in the actions indicated below:

City of Detroit, et al. v. Grinnell Corporation, et al., (68 Civ. 4026 S.D.N.Y.)

1235 Vine Street Building, Inc., et al. v. Grinnell Corporation, et al., (68 Civ. 4027)

Manhattan-Ward, Inc. et al v. Grinnell Corporation, et al., (68 Civ. 4028)

Associated Dept Stores, Inc., et al. v. Grinnell Corporation, et al., (68 Civ. 4029)

and respectfully request fifteen minutes for argument on behalf of my clients in connection with the above captioned appeal, argument

EXHIBIT C-6

being scheduled for March 26, 1970.

Sincerely,

David Berger

DB:th
cc: Joel Hoffman, Esq.
Ira Millstein, Esq.

File briefs etc. Tr. P. C-7

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March 12, 1970

TO: All Subscriber Plaintiffs Counsel

Enclosed herewith is a copy of the brief we filed in the Court of Appeals relating to the Statute of Limitations issue.

The oral argument in this case is scheduled for Thursday, March 26, 1970. Counsel have been requested to respond to the court's calender call at 10:30 AM on that date, although the actual time for argument may be different.

Joel Hoffman will be arguing the case for plaintiffs-appellees. However, David Berger of Cohen, Shapiro, Berger, Polisher & Cohen has requested permission from the court to argue the case on behalf of his own clients.

Sincerely yours,

WEIL, GOTSHAL & MANGES

By A. Paul Victor
A. Paul Victor

APV:AR
ENC.

1074

EXHIBIT C-7

C-7

August 14, 1970

A. Paul Victor, Esquire
Weil, Gotshal and Manges
767 Fifth Avenue
New York, New York 10022

Re: Grinnell - Answer to Petition for Certiorari

Dear Paul:

The following are my thoughts concerning how we should answer the defendants' Petition for Certiorari with respect to the statute of limitations issue in the above matter. As a preface, I think it is important that we confine our brief in answer to the issue of why the Supreme Court should not hear these cases and not to the issue of whether the defendants' contentions have any merit.

1. There Is No Conflict between the Second and Seventh Circuits by Reason of the Decision Below for the Following Reasons:

a. The decisions in the Seventh Circuit involved a different statute than the decision below in the Second Circuit.

EXHIBIT C-8

The Seventh Circuit's decisions relied upon by the defendants construed Section 5 of the Clayton Act, 15 U.S.C. §16, prior to its amendment in 1955. In contrast, the decision below by the Second Circuit construed Section 5(a) of the Clayton Act amended in 1955, 15 U.S.C. §16(a) and (b).

The Supreme Court requires that "The basic questions to be answered in determining whether under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable.... after the prescribed time.'" Burnett v. New York Central Railroad Company, 380 U.S. 424, 428 (1965). The Second Circuit in the decision below complied with this requirement; it looked to the legislative intent in determining the extent to which the statute of limitations was tolled. The relevant legislative intent was expressed in conjunction with the promulgation of the 1955 amendments to Section 5 of the Clayton Act which resulted in amended Sections 5(a) and 5(b). Accordingly this legislative intent upon which the decision below was based was not before the Seventh Circuit in its decision relied upon by defendants nor was it relevant to the issues there at hand. Accordingly there can be no conflict between

the decisions of the Seventh Circuit with the decision below by the Second Circuit.

Moreover the Second Circuit's decision below is in accord with and not in conflict with the cases of this Court and of other Circuit Court of Appeals which have interpreted and applied Section 5(b) of the Clayton Act, as amended 1955. Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., infra; Loh v. General Petroleum Corp., infra; State of New Jersey v. Morton Salt Co., infra; Handy Salt Co. v. State of Illinois infra; Maricopa County v. American Pipe and Construction Co., 308 F. Supp. 77 (D. Ariz. 1969); Dickinson, Inc. v. Kansas City Star Co., 173 F. Supp. 423 (W.D. Mo. 1959).

b. The Second Circuit clearly complied with the requirement contained in the Seventh Circuit cases that in determining whether or not a government proceeding continues to pend subsequent to a Supreme Court order of remand, the district court must scrutinize both the Supreme Court's opinion and order and the District Court's decree on remand. As stated in Teague v. Balaban, 146 F. Supp. 356, 359 (N.D. Ill. 1956), the court stated:

> "A study of the February 8, 1950 and February 7, 1952 decrees would seem to me to be the most logical and intelligent manner in which to approach the problem presented."

Indeed, this is exactly what the Second Circuit did in reaching the decision below:

> "...The Supreme Court's decision, United States v. Grinnell Corp., supra, left important matters open for determination on remand. The Court found it impossible to resolve on the record before it the extent to which long term contract and title retention requirements imposed on central station protective service subscribers constituted substantial barriers to competition requiring protective provisions. The district court was directed to explore the various aspects of the issue on remand and to fashion suitable protection provisions to deprive the two devices of whatever coercive power they might be found to have. 384 U.S. at 578. The Court also directed the district court to replace its broad and generalized restraining order with one specifically enjoining the precise practices found to have violated the Act. Id. at 579. Thus, significant issues remained to be decided by the district court. In this sense the Supreme Court's decision did not finally determine all issues of liability...." Russ Togge, Inc., et al. v. Grinnell Corporation by Second Cir., No. 639 - 42 Sept. Term, 1969 (Second Cir., May 11, 1970) (Petition for Cert. at pages 38, 39).

To this extent, the decision of the Second Circuit below and the decisions of the Seventh Circuit were decided upon distinct and separate factual issues peculiar to each case. Accordingly, any difference in the results reached in these cases cannot be deemed a conflict in the legal applications of the Second and Seventh Circuits.

2. The Alleged Questions Raised by Petitioner with Respect to the Administration of Private Treble Damage Suits under the Clayton Act Have Already Been Resolved by Decisions of the Supreme Court.

Since the promulgation of the amended Sections 5(a) and (b) of the Clayton Act, the Supreme Court has issued two decisions interpreting the congressional intent underlying private antitrust litigation and in particular Clayton Act Section 5(b) and its relationship to 5(a). In Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) the Supreme Court held that proceedings by the Federal Trade Commission toll the running of the statute of limitations in a private antitrust case by reason of the provisionsoof Section 5(b) of the Clayton Act. Later that year the Supreme Court decided Leh v. General

Petroleum Corp., 382 U.S. 54 (1965) reh. den. 382 U.S. 1001, wherein the Court construed the scope of the words "based in whole or in part in any matter complained of in said proceeding" which appear in Section 5(b) of the Clayton Act. In so deciding that case, the Supreme Court reiterated the congressional intent underlying private treble damage actions and the tolling provisions of Section 5(b) of the Clayton Act.

Subsequent to the above cited Supreme Court cases there have been at least two Court of Appeals decisions applying Section 5(b) of the Clayton Act in light of the holdings in 3M and Leh. In Hardy Salt Co. v. State of Illinois, 377 F. 2d 763 (8th Cir. 1967) cert. den., 389 U.S. 912 (1967), the Eighth Circuit Court of Appeals held that Section 5(b) of the Clayton Act tolled the running of the statute of limitations during the pendency of a government antitrust proceeding and for one year thereafter "as to a party named as a co-conspirator, and not as a defendant in the government litigation." 377 F. 2d at 769. In State of New Jersey v. Morton Salt Co., 337 F. 2d 94 (3rd Cir. 1967), cert. den. sub nom., International Salt Company v. New Jersey, 391 U.S. 967 (1968), the Third Circuit Court of Appeals held that the

tolling provisions of Section 5(b) of the Clayton Act applied to a subsequent treble damage action based in whole or in part on a prior government proceeding even as to defendants in the private action who were not named as defendants or co-conspirators in the related government action. It further held that Section 5(b) tolled the statute of limitations until the government proceeding was concluded as to the last defendant, even though a defendant in the government and private proceedings entered an earlier consent decree in the government proceedings and would otherwise have been protected by the statute of limitations. Both these cases applied the guide lines set forth in 311 and Leh. In bothcases petitions for writs of certiorari were filed and in both cases the petitions were denied.

In the cases sub judice, the Second Circuit in the decision below interpreted and applied Section 5(b) of the Clayton Act in light of the congressional purposes and intents as set forth in 311 and Leh and by the Eighth and Third Circuits in Hardy Salt Co. and Morton Salt Co. respectively. As certiorari was denied in the later two cases, certiorari should be denied in the present cases.

3. That portion of the decision behof holding that the Government action continued to pend until one year after the time for appeal has expired is consistent with the congressional intent underlying Section 5(b). The Court below refused to apply "...a niggardly construction of the statute's language here in question", Leh v. General Petroleum Corp., supra, 382 U.S. at 59, and interpreted the statute "in a way which will permit a determination on the merits of private claims in this area" New Jersey v. Morton Salt Co., supra, 387 F. 2d at 97. Accordingly the Second Circuit's decision below was in accordance with a clear reading of the statute as applied by the Supreme Court and Courts of Appeals of various circuits. [Regardless of the treatment of this issue, it should be treated separately from the preceeding issues. If defendants' position here has any merit, then certiorari should be granted only in the cases directly involved in the ruling (four in number) concerning the appeal period.]

I will be more than happy to participate in the drafting of the brief in answer to the Petition for Certiorari. Please

advise me of your schedule, including any drafting meetings.

With best personal wishes, I am

Sincerely yours,

COHEN, SHAPIRO, BERGER,
POLISHER and COHEN

H. Laddie Montague, Jr.

HLM,Jr./th

cc: Barry J. Brett, Esquire

C-9 C-10

PARKER, CHAPIN AND FLATTAU
630 FIFTH AVENUE
NEW YORK, N.Y. 10036

TELEPHONE
586-7600
AREA CODE 212

CABLE ADDRESS
LAWPARK

August 19, 1970

TO: Herbert Robinson, Esq.
A. Paul Victor, Esq.
Max Wild, Esq.
H. Laddie Montague, Jr., Esq.

Gentlemen:

There is enclosed herewith a draft of a brief in opposition to the petition for certiorari in the CSPS cases. Please review the enclosure and let me have your general comments before the end of the week. I would suggest that we plan on scheduling a meeting of our group in the very early part of next week.

Very truly yours,

Barry J. Brett

BJB:dmy
Enc.

1084

EXHIBIT C-9

"D"

November 16, 1970

Barry J. Brett, Esquire
Parket, Chaplin & Flattau
530 Fifth Avenue
New York, New York 10036

Re: Grinnell Cases

Dear Barry:

I was greatly disturbed and annoyed to learn from your letter of November 10, 1970 that a meeting of "lead counsel" had been held concerning the future progress of these actions and that our office was not apprised of such meeting. As you know, we have participated in every phase of this litigation, have attended and contributed to all similar past meetings, and have contributed heavily to the matters completed to date. Without regard to any nomenclature as to "lead counsel", we have always taken an active role in all antitrust litigation in which we participate, especially where our clients, as here, are representative of national classes. I was surprised at your omission to notify us and hope that it was inadvertent. With respect to future meetings, I anticipate that we will be notified.

With respect to the matters set forth in your letter, we will certainly participate in the research relating to theories of damages and proof thereof. I will forward a separate letter in answer to the substantive aspects raised in that letter.

Sincerely,

David Berger

DB:th

EXHIBIT "D"

WILLIAM H WEISSMAN
STEPHEN M TRUITT
JAMES R WHITE
KEITH S WATSON
TONI K GOLDEN
JAMES DOUGLAS WELCH
ROBERT A SKITOL
THOMAS W BRUNNER*

*NOT ADMITTED IN D C.

CABLE ADDRESS: WALHARK

OF COUNSEL
PHILIP ELMAN
NEAL P RUTLEDGE

May 18, 1973

PLTS. EXL 6

Gordon B. Spivack, Esquire
Lord, Day & Lord
Cunard Building
25 Broadway
New York, New York 10004

Dear Mr. Spivack:

This is to confirm our telephone conversation yesterday in which we agreed that David Berger or David Berger, P.A., Attorneys-at-Law will pay Wald, Harkrader & Ross $20,000 ("the settlement amount") in full satisfaction of any and all claims Wald, Harkrader & Ross or I may have, whether or not legally valid, against (a) the fee awarded to David Berger and David Berger, P.A., Attorneys-at-Law by the Judgment entered January 26, 1973 by Judge Metzner in the Grinnell national class actions, (b) David Berger, (c) David Berger, P.A., Attorneys-at-Law, and (d) the classes represented in the Grinnell national class actions or any member of said class, because of legal services performed by me or Wald, Harkrader & Ross in connection with any central station protection service litigation.

David Berger or David Berger, P.A., Attorneys-at-Law will pay Wald, Harkrader & Ross the settlement amount in full when David Berger, or David Berger, P.A., Attorneys-at-Law, or any firm of which David Berger is then a member or with which he is then associated, receives the first installment of a fee for representing the national classes in the Grinnell litigation.

The obligation of David Berger and David Berger, P.A., Attorneys-at-Law to pay the settlement amount accrued when this settlement agreement was reached on May 17, 1973, and is an unconditional obligation not to be affected by any event which may occur subsequent to that date.

Plaintiff Exhibit #6

I would appreciate your signing the enclosed copy of this letter and returning it to me, acknowledging that this letter constitutes an accurate statement of our agreement.

Sincerely,

WALD, HARKRADER & ROSS

By: _____
Joel E. Hoffman, a member of the firm

JEH:asl

Enclosure

Agreed to on behalf of
David Berger and David Berger,
P.A., Attorneys-at-Law

LORD, DAY & LORD

25 BROADWAY

NEW YORK, N. Y. 10004

TELEPHONE: (212) 344-8480

CABLE: LORDATTY, NEW YORK

TELEX: 12-8210 (WU)

62589 (WUI)

R. PALMER BAKER, JR.
HENRY de FOREST BALDWIN
JOHN F. BARRY, JR.
HENRY C. BLACKISTON
DAVID N. BOTTOMS, JR.
HERBERT BROWNELL
JOHN W. CASTLES 3d
RICHARD G. COHEN
RALPH L. CONCANNON
THOMAS F. DALY
SAMUEL S. FRIEDMAN
JOHN D. GARRISON
VINCENT R. GILMORE
EMERY W. HARPER
ARTHUR B. HOOKER
FRANKLIN G. HUNT
JACK P. JEFFERIES
PETER L. KEANE
REIGH F. KLANN
JOHN J. LOFLIN
TOWNSEND M. McALPIN
JOSEPH F. McDONALD
GORDON L. NASH
KENNETH E. RYAN
J. EDWARD SHILLINGSBURG
GORDON B. SPIVACK
MARK THOMAN
CHARLES R. WALKER, III
JOHN R. WATSON, JR.

Pl'ts. Exh. 7

October 21, 1975

A. Paul Victor, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10022

Herbert Robinson, Esq.
Liebman, Eulau, Robinson,
& Perlman
32 East 57th Street
New York, NY 10022

Alvin M. Stein, Esq.
Parker, Chapin and Flattau
530 Fifth Avenue
New York, NY 10036

Gentlemen:

This is to confirm our agreement that David Berger or David Berger, P.A., Attorneys-at-Law will pay Weil, Gotshal & Manges; Liebman, Eulau, Robinson, & Perlman and Parker, Chapin and Flattau $100,000, or 10 percent of the fee awarded to David Berger and David Berger, P.A., Attorneys-at-Law by the Court in the Grinnell national class actions, whichever is greater ("the settlement amount") in full satisfaction of any and all claims that Weil, Gotshal & Manges; Liebman, Eulau, Robinson & Perlman and Parker, Chapin and Flattau may have against (a) the fee awarded to David Berger and David Berger, P.A., Attorneys-at-Law by the Judgment entered by the Court in the Grinnell national class actions, (b) David Berger, (c) David Berger, P.A., Attorneys-at-Law, and (d) the classes represented in the Grinnell national class actions or any

Plaintiffs' Exhibit 7

member of said class which participated in the fund created by settlement of the Grinnell national class actions (other than a member of said class represented by Weil, Gotshal & Manges; Liebman, Eulau, Robinson & Perlman or Parker, Chapin and Flattau in connection with the Grinnell litigation prior to October 21, 1975), because of legal services performed by Weil, Gotshal & Manges; Liebman, Eulau, Robinson & Perlman or Parker, Chapin and Flattau in connection with any central station protection service litigation.

David Berger or David Berger, P.A., Attorneys-at-Law will pay Weil, Gotshal & Manges; Liebman, Eulau, Robinson & Perlman and Parker, Chapin and Flattau the settlement amount in full when David Berger or David Berger, P.A., Attorneys-at-Law, or any firm of which David Berger is then associated, has received 50 percent of the fee awarded for representing the national classes.

The obligation of David Berger and David Berger, P.A., Attorneys-at-Law to pay the settlement amount accrued when this settlement agreement was reached on October 21, 1975, and is an unconditional obligation not to be affected by any event which may occur subsequent to that date.

I would appreciate your signing this letter and returning it to me acknowledging it constitutes an accurate statement of our agreement. I am enclosing an additional copy of the letter for your records.

Sincerely,

LORD, DAY & LORD

By _____
Gordon B. Spivack
A Member of the Firm

Agreed to on behalf of:

Weil, Gotshal & Manges

By _____
A Member of the Firm

Liebman, Eulau, Robinson & Perlman

By _____
A Member of the Firm

Parker, Chapin and Flattau

By _____
A Member of the Firm

2. Fil. Sheet-2
Grinnell
6353-40-1

Plts. Exh. 8

LORD, DAY & LORD

25 BROADWAY

NEW YORK, N Y 10004

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KENNETH E. RYAN
J. EDWARD SHILLINGSBURG
GORDON B. SPIVACK
MARK THOMAN
CHARLES R. WALKER, III
JOHN K. WATSON, JR.

April 17, 1975

G. Joseph King, Esq.
Howrey, Simon, Baker &
Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: City of Detroit v. Grinnell -
Hearing on Counsel Fees

Dear Joe:

This is to confirm our telephone conversation of earlier today during which I notified you that the hearing on counsel fees in the above matter will take place during the month of September, 1975 on a date to be set by Judge Metzner.

The Judge has requested that we inform you that any party wishing to undertake any discovery in this matter should commence any such discovery as soon as possible with a view to having such matters completed in time for a September hearing.

Sincerely,

Thomas D. Brislin

TDB:cc

cc: Honorable Charles M. Metzner

LORD, DAY & LORD

25 BROADWAY

NEW YORK, N.Y. 10004

TELEPHONE: (212) 344-6480

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KENNETH E. RYAN
J. EDWARD SHILLINGSBURG
GORDON B. SPIVACK
MARK THOMAS
CHARLES R. WALKER, III
JOHN K. WATSON, JR.

Plts. Exh. 9.

October 7, 1975

G. Joseph King, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Grinnell Fee Claims

Dear Joe:

In light of the fact that we have not yet received from your firm any substantive response to our proposed "Statement of Facts" submitted to you on August 12, 1975 for the purpose of possible stipulation in the above matter, and in view of your request in your September 12, 1975 letter concerning examining the relevant time records of the Berger firm, I thought it would be appropriate to write this letter clarifying the procedures I had thought we had agreed upon.

I am somewhat perplexed by the request in your September 12th letter that we send to you the time records of Mr. Berger's firm since I thought we had agreed during our telephone conversation of September 9, 1975 that you would come to either Mr. Berger's office in Philadelphia or our office in New York to examine Mr. Berger's time records. In any event, I informed you during our telephone conversation that we would not be amenable to simply shipping this number of documents down to your office, but that such records would be available for your inspection at any time upon your advance notice to us of one or two days. This offer still stands.

If you still wish to examine any or all of the time records of the Berger firm in connection with this matter at any time up until the hearing on November 10th, 1975, please contact me in order that we can arrange an appropriate time convenient to both our schedules.

In addition, I am still expecting that your firm will inform us shortly of the matters contained in our proposed "Statement of Facts" which you do not intend to contest at the upcoming fee hearing on November 10, 1975, as well as any stipulated facts, suggested by you or us, that you wish to discuss. I assume you still intend to shortly send to us such a detailed response since Bill Simon offered the same in his September 3, 1975 letter to Gordon Spivack and you informed me in your September 12th letter that another letter would be shortly forthcoming from you enumerating the suggested fact findings you would at least not contest.

As I am sure you understand, unless we are aware very soon of precisely what suggested findings you intend to put in issue, we will be required to undertake immediate discovery along lines already suggested.

Sincerely,

Thomas D. Brislin

TDB:cc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Obj. Ex. A.

CITY OF DETROIT, et al.	
v.	68 Civ. 4026 (E.D. Pa. Civ. 68-1478)
GRINNELL CORPORATION, et al.	
MANHATTAN-WARD, INC., et al.	
v.	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
GRINNELL CORPORATION, et al.	
1225 VINE STREET BUILDING, INC., et al.	
v.	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)
GRINNELL CORPORATION, et al.	

AFFIDAVIT OF JOEL E. HOFFMAN

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

JOEL E. HOFFMAN, being duly sworn, deposes and says:

1. This Affidavit is submitted in support of the Application of Wald, Harkrader & Ross (hereafter WH&R) for Apportionment of Counsel Fees. It demonstrates that by agreement of all plaintiffs' counsel, WH&R successfully performed the principal substantive work on the statute-of-limitations issue for all affected plaintiffs in the consolidated Central Station Protection Service litigation, including the class representatives and members herein, and successfully presented the principal oral argument to the Second Circuit on defendants' interlocutory appeal; that, as Petitioner David Berger, Esq. and the "Troika" applicants all agree, the repulse of defendants' statute-of-limitations motion preserved the viability of these class actions and substantially contributed to the creation of the settlement fund in the size presently before this Court; and that 10% of the total counsel fee award would be just and reasonable compensation for WH&R's services to the class.

2. I am a member of the firm of Wald, Harkrader & Ross, which was counsel for the plaintiffs (competitors of defendant ADT) in Electro-Protective Corp. et al. v. Grinnell Corp. et al., No. 68 Civ. 4629 (D.N.J. Civ. No. 763-68), dismissed per stipulation, Aug. 14, 1970. That action, initially filed in the District of New Jersey, was transferred to this Court on November 14, 1968 by the Judicial Panel on Multidistrict Litigation, to be consolidated with other Central Station Protection Service litigation. Thereafter I actively participated on behalf of WH&R, as counsel for the competitor-plaintiffs in 68 Civ. $4629, in the coordinated pretrial proceedings. 1/

3. In late June of 1969, WH&R was designated by the caucus of counsel for competitor-plaintiffs to be their representative in the litigation of defendants' statute-of-limitations motion. In that capacity I attended a meeting convened by Weil, Gotshal & Manges to organize the preparation of a brief in opposition to that motion. At the meeting, it was agreed that a single brief should be prepared on behalf of all affected plaintiffs, including the class representatives, except for some few subscriber-plaintiffs in a distinctive position re the statute of limitations who wished to file a separate memorandum. Specifically, it was never suggested by anyone that the issues as to class representatives or members were in any way distinctive or that their interests should be separately presented. To the contrary, Herbert B. Newberg, Esq. (a colleague of David Berger, Esq.) was

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1/ Although not a member of the bar of this Court, I was authorized to participate by reason of Rule 3 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

designated to prepare a draft brief for all affected plaintiffs, to be reviewed and revised by a committee consisting of Mr. Newberg, representatives of the "Troika", and myself. The next day I sent some comments on defendants' position to Herbert Robinson, Esq. (a member of the "Troika"), who then circulated them to the other members of the committee. I wrote Mr. Robinson again on July 15, 1969 with further comments on defendants' argument.

4. By letter dated July 18, 1969, Mr. Newberg forwarded to me "a draft of a portion of the brief", which I circulated to the other competitor-plaintiffs' counsel. As several of us noted, the Newberg draft inter alia omitted any discussion of a major line of authority supporting plaintiffs which could be relied upon to rebut defendants' motion. This and other difficulties with the draft were discussed by telephone among the revision committee members. It was agreed to cancel the meeting previously planned for July 23 and that an entirely new draft should be prepared by Weil, Gotshal & Manges (also a member of the "Troika"). A few days thereafter I mailed to A. Paul Victor, Esq. of that firm some comments for consideration, including suggested authorities not previously mentioned.

5. Plaintiffs' brief was due August 11, 1969. The draft prepared by Weil, Gotshal & Manges (more than twice the length of Mr. Newberg's) was first made available to other committee members, however, at a meeting on Friday, August 1. At that time it was agreed that yet a third new draft should be prepared, this time by me.

6. On Tuesday, August 5 I circulated a new draft to the members of the committee, requesting them to submit their comments by telephone by the afternoon of August 8. This

draft was newly written almost in its entirety, and also included the fruits of legal research not provided by the prior drafts or their authors.[2/] Comments, primarily stylistic and minor in character, were received from committee members Victor, Brett (representing the third "Troika" firm), and Newberg. These were duly noted by me in preparing the final version, which I mailed to Weil, Gotshal & Manges on Thursday, August 8 for reproduction and filing the next Monday.

7. The relative contributions of the statute-of-limitations committee members (the "Troika", Mr. Newberg, and myself) were reflected in the order in which the names of our respective firms appeared on the brief as filed. With the agreement of all, WH&R appeared first, followed by an alphabetical listing of the other participating firms.

8. WH&R played no direct role in the preparation of plaintiffs' papers in opposition (in both this Court and the Second Circuit) to defendants' application under 28 U.S.C. §1292(b) for leave to appeal from this Court's order denying their motion. It should be noted, however, that - as might be expected - the letters and memorandum in opposition drew heavily on plaintiffs' original brief to this Court, and in the case of the Court of Appeals memorandum incorporated significant portions verbatim.

9. After defendants' interlocutory appeal was allowed by this Court and the Court of Appeals, it was agreed by the "Troika", Mr. Newberg, and myself that the appeal brief for plaintiffs-appellees would be drafted by me. The draft was circulated to Weil, Gotshal & Manges representing the affected

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2/ Some of the new research material had been provided by other competitor-plaintiffs' counsel.

subscriber-plaintiffs, and to all competitor-plaintiffs' counsel, on February 13, 1970. Minor comments were received from two of the latter, and longer ones from Mr. Robinson of the "Troika", and from H. Laddie Montague, Esq. (a colleague of Mr. Berger and Mr. Newberg). Mr. Montague's comments were contained in a 5-page letter, while Mr. Robinson's comprised a 5-page suggested revision of a point already made in the draft. The statute-of-limitations committee discussed the draft at a single meeting, and the brief was filed with the Court of Appeals in substantially the form of the draft. The printing was supervised by Weil, Gotshal & Manges, although I too reviewed the galley proofs and provided final editorial corrections.

10. As with the original brief in this Court, the signatures on the Court of Appeals brief were arranged so as to reflect the relative contributions of counsel. WH&R was listed first, followed by Weil, Gotshal & Manges; Mr. Berger's firm; counsel for the subscriber-plaintiffs who had filed a short separate Memorandum in this Court on a separate point affecting only them; the remaining members of the "Troika"; and another firm which had attended the committee's editorial meeting.

11. It was further agreed by all the foregoing firms that the interests of all plaintiffs-appellees would best be served if a single oral argument were presented. I was designated to present the joint argument, calendared by the Court of Appeals for March 26, 1970. Early in March, just prior to the filing of the Brief for Plaintiffs-Appellees, I was advised that Mr. Berger had nevertheless determined to participate in oral argument. During my efforts to contact him to discuss the matter (which took several days),

Mr. Berger wrote to the Court of Appeals Clerk that he intended to appear. He subsequently declined to meet with me so as to attempt a rational division of the argument, although he did promise to refrain from conflict with or duplication of the substance of my presentation and to stress the particular importance to the class representatives and members that this Court's ruling be affirmed.

12. At oral argument in the Court of Appeals I argued all aspects of the case and sought to rebut each of the principal arguments advanced by defendants-appellants. No points were raised by them on brief or at oral argument which were limited to the class representatives and members. Mr. Berger's argument which followed mine, included no points not previously advanced except for a comment on the favor with which the courts should look on treble damage claims by state and local governmental bodies.

13. The claims of WH&R's clients were settled after the Court of Appeals affirmed this Court's denial of defendants' statute-of-limitations motion, and WH&R therefore did not directly participate in the preparation of the brief in opposition to defendants' certiorari petition. As with the memoranda previously filed by plaintiffs in opposition to allowance of an interlocutory appeal, however, it should be noted that the Supreme Court brief in opposition was also largely drawn from the briefs for which WH&R had primarily been responsible.

14. The important role of the statute-of-limitations proceedings in the creation of the fund before this Court is fully discussed in the papers filed by Counsel for the Class Representatives and by the "Troika", and need not be rehearsed here. Suffice it to observe that, according to

Mr. Berger, the result of defeating defendants' statute-of-limitations motion was not only to "preserve the viability of these lawsuits" (Petition of Counsel for Class Representatives, p. 5) but also to enlarge the damage period almost threefold, from the usual four years to 11 years (Mem. of Counsel for Class Representatives in Support, p. 20). As Mr. Berger has also noted, moreover (id., pp. 45-46):

> "the limitations issue was both difficult and unique, so that the eventual success could not have been predicted with confidence."

The great value of this victory, to which WH&R made the principal contribution, is similarly recognized by the "Troika" (Mem. of Law in Support of Application to Limit and Apportion Counsel Fees, pp. 7-8, and Affidavits in support thereof). Those Affidavits further note not merely that Mr. Berger failed to "materially aid, affect, alter or influence the favorable result" (Stein Aff., ¶10) but that his participation in oral argument was "a matter of surprise and distress" (Robinson Aff., ¶17) and "in some respects * * * disruptive" (Victor Aff., ¶5).

15. Regrettably, it is necessary to dispel some possible inaccurate implications in the papers filed by the "Troika". While the "Troika" (particularly Weil, Gotshal & Manges) did in fact carry a significant administrative burden in coordinating the work assignments on the statute-of-limitations motion and in duplicating, filing and serving the various briefs, the substantive contributions of the "Troika" in the proceedings on that motion were limited in nature. Thus, without deprecating the helpfulness of the "Troika's" review of the drafts prepared by WH&R which became the final products without significant change, or the value of the research memorandum provided by Liebman, Eulav, Robinson & Perlman and the proposed draft prepared by Weil, Gotshal &

Manges, I must respectfully disagree with any suggestion that the "Troika" "played the most significant role" (Stein Aff., ¶6) either in this Court or in the Court of Appeals. For while the "Troika" firms were more active on the statute-of-limitations motion and the subsequent appeal than any other firm representing subscriber plaintiffs (see Victor Aff., ¶5), and while counsel with "the laboring oar regarding this key motion was * * * counsel other than counsel for the * * * class representatives" (ibid.), that laboring oar was borne not by the "Troika" but by WH&R.

16. The time contributed by WH&R to the litigation of the statute-of-limitations motion and appeal on behalf of all affected plaintiffs was in excess of 150 hours. This runs only from the meeting of July 9, 1969 at which I was designated a member of the statute-of-limitations committee, and excludes substantial time expended prior to that date in researching the issue on behalf of WH&R's own clients, but which necessarily contributed to the final written product filed on behalf of all affected plaintiffs, including the class representatives and members.

17. In view of the attention paid in these matters to the experience of counsel, I would note that I graduated from Yale Law School in 1960, when I was admitted to the New York Bar; that I was employed for three years in the Appellate Section of the Antitrust Division of the U. S. Department of Justice, where I briefed and argued numerous antitrust and regulatory agency appeals, and drafted the briefs for the United States to the Supreme Court in several major antitrust cases as well as cases involving novel and complex questions of administrative law; and that I have subsequently practiced with WH&R (since 1968 as a partner) working primarily in

antitrust and litigation matters, on behalf of both plaintiffs and defendants or prospective defendants.

18. The entitlement of counsel in the position of WH&R to share in the fees awarded out of the present settlement fund is established by the authorities set forth in the "Troika's" Memorandum of Law. I believe that, in view of the importance of WH&R's contribution in "preserving the viability of these lawsuits" so as to create the fund, and more particularly in bringing the fund to its present size by reason of trebling the recoverable damage period, a just and reasonable fee would be 10% of the total counsel fee award. Whether this amount should come from the share apportioned to counsel for the class representatives, from the share apportioned to the "Troika" (whose contributions apart from the statute-of-limitations proceedings I do not question), or in part from each, is a matter on which I express no opinion.

And further, deponent saith not.

/s/

Sworn to before me this
day of May, 1972

/s/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(28)

Obj. Exh. B.

CITY OF DETROIT, et al.	:	
v.	:	68 Civ. 4026 (E.D.Pa. Civ. 68-1473)
GRINNELL CORPORATION, et al.	:	
v.	:	
MANHATTAN-WARD, INC., et al.	:	
v.	:	68 Civ. 4028 (E.D.Pa. Civ. 68-1489)
GRINNELL CORPORATION, et al.	:	
1225 VINE STREET BUILDING, INC., et al.	:	
v.	:	68 Civ. 4027 (E.D.Pa. Civ. 68-1479)
GRINNELL CORPORATION, et al.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

A. PAUL VICTOR, being duly sworn, deposes and says:

1. I am a member of the firm, Weil, Gotshal & Manges, one of the three firms appointed as lead counsel by this Court in July 1969 (the "Troika") in connection with all subscriber actions pending before this Court for treble damages against the defendants for antitrust violations in the accredited central station protection service business, including the class actions specifically involved therein. The other firms

constituting the Troika are Pa[illegible]r, Chapin & Flattau and Liebman, Eulau, Robinson & Perlman.

2. My law firm has initiated three individual actions against these same defendants for substantially the same violations of the antitrust laws (68 Civ.2669, 2670 ,2671), and has acted as local counsel with respect to two more such actions (67 Civ.2249and 68 Civ.1479,E.D.Pa). The plaintiffsin two of those actions have decided to remain in the class and to participate in the allocation of the settlement fund (68 Civ. 1479,E.D.Pa. and 68 Civ. 2671). My law firm also represents, and has filed appearances on behalf of, seven additional members of the class that are pursuing their claims against defendants through the filing of "Sworn Statements of Claim" pursuant to a Legal Notice from this Court, dated December 13, 1971.

3. This affidavit is submitted as a supplement to the affidavits of Alvin M. Stein and Herbert Robinson, and in support of the relief therein requested. More specifically, this affidavit is submitted in support of the position that the amount of attorney's fees applied for by David Berger, P.A., attorneys for the plaintiffs-class representatives in these cases, is excessive; that the attorney's fees to be awarded in connection with the settlement fund should not be in excess of 20% of the gross fund; and that the Troika should be awarded an amount equal to at least 25% of the amount of attorney's fees actually awarded, as compensation for the work it performed which helped successfully to generate

the settlement fund presently before this Court for approval.

4. Based upon my own personal knowledge, and a review of the records and other documents relating to all of the cases against the defendants at my office, I can state that since the early days of said actions, my law firm has been intimately involved in the efforts of coordinating the activities of all subscriber and competitor plaintiffs (later just subscriber plaintiffs), and of advancing the progress of the lawsuits instituted by all such plaintiffs, including those instituted on behalf of the class. My law firm's activities included those of a substantive and administrative nature which benefitted the progress of all actions of a similar nature. The other members of the Troika (as well as other law firms from time to time) likewise undertook activities on behalf of their own clients or all plaintiffs, which substantially advanced the progress of these lawsuits for all plaintiffs, including the class action plaintiffs. The work done by the Troika (and, from time to time, certain other law firms) redounded to the benefit of the class action plaintiffs and contributed to the successful generation of the settlement fund presently before this Court for approval. I respectfully submit that, without the assistance resulting from the Troika's activities, the class action settlement could not have been achieved in the time period involved, or, at least could not have been achieved without a considerably greater undertaking

by David Berger, P.A.

5. Without fully belaboring the many activities which involved hundreds of hours of time spent by attorney's in my law firm in these cases (considerable detail as to which was set forth in the affidavits of Messrs. Stein and Robinson regarding the Troika's contributions), I will nevertheless set forth below some of the activities performed by my firm that redounded to the benefit of all plaintiffs, including the class action plaintiffs. We:

(a) Assisted in the drafting, revising, preparation and completion of plaintiffs' Rule 34 document request and First Set of Interrogatories, which sought to round out and complete preliminary additional discovery deemed necessary to complement the record and other documents available as a result of the Government's successful antitrust action against defendants;

(b) Agreed, along with Parker, Chapin & Flattau and Liebman, Eulau, Robinson & Perlman, to serve on, and undertake the tremendous responsibilities of, the Troika, which was to act as lead counsel in these cases on behalf of all subscriber plaintiffs, including the class action plaintiffs;

(c) Participated extensively and substantially in the researching, drafting, revising, coordination of counsel, printing and filing, of the various briefs prepared by plaintiffs in opposition to defendants' motion for partial summary judgment based upon the statute of

limitations. Unquestionably, all parties to these actions considered the statute of limitations issue to be highly significant regarding the prosecution of these actions. In that connection, I and other persons in my firm, personally participated and expended hundreds of hours in performing the above-mentioned tasks. I believe that the laboring oar regarding this key motion was performed by counsel other than counsel for the plaintiffs - class representatives in these actions. More particularly, for subscriber plaintiffs, the great bulk of the work was performed by the Troika. The work performed by my firm included considerable research regarding the tolling of the statute of limitations under the Clayton Act; assistance in the revision to the draft brief in opposition before the District Court; research, assistance in the drafting and coordination of the opposition to the certification petition filed by defendants; revision to the draft and coordination with respect to the brief in opposition in the Court of Appeals; planning, development and coordination of strategy for purposes of plaintiffs' oral presentation to the Court of Appeals; assistance in the drafting and coordination of the brief in opposition to the Petition for Certiorari; attendance at many conferences to finalize and revise the papers involved. While David Berger, P.A. or its predecessor firm contributed in some respects to the preparation of the aforementioned papers, its role was certainly not major. In fact, in

some respects, its role was disruptive of the careful strategy planned by plaintiffs' counsel. For example, after careful deliberation and planning, it was agreed that only one attorney would argue for plaintiffs in the Court of Appeals. Since that attorney represented competitor plaintiffs, it was agreed that one knowledgable representative of the subscriber plaintiffs (Mr. Brett) be at counsel table to ensure that subscriber plaintiffs interests were properly represented. Mr. Berger was not authorized to appear on behalf of subscriber plaintiffs in this coordinated effort. Mr. Berger nevertheless unexpectedly appeared on the morning of the argument and announced his intention to appear and argue as well. This sudden change in plans and lack of coordination resulted in some trying moments, I am informed, during which time plaintiffs' counsel had to provide Mr. Berger with a subject for presentation to the Court in order to ensure that plaintiffs strategy would not be undermined by Mr. Berger's appearance. As a result of plaintiffs' success in defending against this motion, the damage period was conclusively extended backward to at least 1957 instead of four years prior to the filing of complaints, as defendants' sought. The success of plaintiffs enabled counsel for the plaintiffs-class representatives to seek recovery for a period of some seven years more than might otherwise have been possible if plaintiffs had failed in their defense against this motion. Plaintiffs' success against this

motion materially advanced the negotiating position of David Berger, P.A., and, in my opinion, the size of the settlement fund which the defendants agreed to. The principal work done to achieve this success, and thereby increase the size of the fund, was performed by counsel other than David Berger, P.A., including more particularly, the members of the Troika; and

(d). As a member of the Troika, engaged in continuous coordination activities with respect to the cases of all subscriber plaintiffs, including the class action plaintiffs. In this connection, we circulated materials, answered telephonic and letter communications, planned overall strategy with the other Troika members, and others, attended pre-trial conferences, meetings of subscriber plaintiffs' counsel, etc.

6. In addition to the above activities performed as a member of the Troika, my firm also assisted from the outset to ensure the more effective and efficient prosecution of these cases. Thus, we:

(a) Assisted in the preparation of papers and appeared before the Court in connection with defendants' unsuccessful motion to strike the reference in the complaint of Federated Department Stores (67 Civ.2249) to the decisions of the United States District Court and United States Supreme Court adverse to defendants under the United States antitrust laws on which these private treble damage actions were based;

(b) Attended the session at which the Judicial

Panel on Multidistrict Litigation considered the transference of all of these lawsuits to one court for pretrial discovery purposes;

(c) Participated at the meeting of plaintiffs' counsel in Washington, D. C. on August 7, 1968 at which coordination among said counsel was discussed and established in accordance with the request of the Judicial Panel on Multidistrict Litigation; and

(d) Participated and helped to organize and lead the pre-Troika Steering Committee which then coordinated and directed the work of plaintiffs' counsel, particularly insofar as the organization of discovery was concerned.

7. All of the foregoing was, of course, coupled with our examination of materials and documents in the depository and elsewhere, the knowledge from which enabled us to perform better our function on behalf of the Troika.

8. The foregoing highlights the nature of the activities undertaken by my firm, largely in connection with its responsibilities as a member of the Troika. It is respectfully submitted that this work, and the work of the Troika in general, greatly assisted in advancing the discovery and other progress in these cases to the benefit of all plaintiffs, including class action plaintiffs, and not just those plaintiffs specifically represented by each Troika law firm. Coordination resulted in more effective and efficient discovery, and uniformity in connection with substantive legal issues of interest and importance to all

plaintiffs, such as the statute of limitations matter. Coordination advanced the ability of all plaintiffs to develop their cases more meaningfully, expeditiously and effectively. Coordination was made possible and effective by the Troika's efforts.

9. I respectfully submit that coordination, and the discovery and substantive tasks performed by the Troika, enable the attorneys for the plaintiffs - class representatives to be in the position of negotiating a settlement at an earlier stage of the proceedings than they otherwise could have without exerting considerably more additional time and effort on their own to advance the cases of class action plaintiffs. Moreover, since the individual subscriber plaintiffs were also members of the classes represented by David Berger, P.A., the possibility of these individual plaintiffs not opting out (as in fact occurred, including two which my firm represents) advanced and supported David Berger, P.A.'s ability to negotiate a settlement fund higher than might have otherwise been the case. The work done by the Troika on behalf of its own clients and all subscriber plaintiffs directly contributed to David Berger, P.A.'s ability to negotiate this higher settlement fund at this point in time than would otherwise have been possible, as well as assisted in the successful generation of the fund itself.

10. It is respectfully submitted that counsel fees of 25% of the gross settlement fund would be inappropriate and overly generous in this case. In any

event, in view of the significant contribution made by the Troika and others to the successful generation of the settlement fund, it is respectfully submitted that the Troika should be awarded at least 25% of whatever counsel fees are awarded by the Court in this matter.

A. PAUL VICTOR

Sworn to before me this
8th day of May, 1972.

ANNA MARIE O'CONNOR
NOTARY PUBLIC, State of New York
No. 24-812[illegible]
Qualified in Kings County
Commission Expires March 30, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.,	:	68 Civ. 4026
	:	(E.D. Pa. Civ. 68-1478)
v.	:	
GRINNELL CORPORATION, et al.	:	
MANHATTAN-WARD, INC., et al.	:	68 Civ. 4028
	:	(E.D. Pa. Civ. 68-1489)
v.	:	
GRINNELL CORPORATION, et al.	:	
1225 VINE STREET BUILDING, INC., et al.,	:	68 Civ. 4027
	:	(E.D. Pa. Civ. 68-1479)
v.	:	
GRINNELL CORPORATION, et al.	:	

A F F I D A V I T

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

HERBERT ROBINSON, being duly sworn, deposes and says:

1. This affidavit is submitted to supplement the affidavits of ALVIN M. STEIN and A. PAUL VICTOR and in support of the relief therein requested. It is respectfully urged that the attorneys' fee to be awarded in connection with the settlement fund be not in excess of 20% of such gross settlement fund and that the "Troika" receive an award of at least 25% of the amount so awarded as counsel fees for the crucial and important role which they performed in helping to create the settlement fund in the size presently before this Court.

2. I am a senior partner of the law firm of Liebman, Eulau, Robinson & Perlman, which is one of the three law firms

constituting the "Troika" (lead counsel) designated by this Court in Pre-Trial Order No. 1 dated July 2, 1969.

3. Prior thereto, in 1967 and 1968, my law firm initiated six individual actions against the same defendants for substantially the same violations of the antitrust laws (67 Civ. 2259, 2615, 2616 and 3820, and 68 Civ. 2361 and 2509).

In addition to the participation of my law firm, as above described and as described below, in the activities of the Troika, my law firm represents some 60 claimants in the class.

4. From the commencement of the actions brought on behalf of subscribers, my law firm has played a significant role in acting on behalf of all subscriber plaintiffs in seeking to advance the progress of the actions and bring about the earliest and most favorable disposition of the pending actions. Our efforts and activities, both before and after the formalization of the Troika, included activities of a substantive and administrative nature which were performed as part of a lead group on behalf of all subscriber plaintiffs, including the three above-captioned class actions. Necessarily, these activities involved constant coordination, study and consultation, which was not required in connection with the six individual actions in which my firm appeared of record. Thus, much of the time and work expended by us was not related to any services necessary for the prosecution of the six actions in which we appeared as counsel of record. Moreover, and most significantly, the activities performed by my firm and the other firms constituting the Troika were the primary forces in advancing all of the subscriber actions, including the class actions, to the point which made possible the settlement

reached by counsel of record in the above-captioned class actions. I respectfully submit that if these activities of the Troika had not been performed, the class action settlement would not have been reached at the time and in the amount presently before the Court for approval. There is set forth below, in capsule form, an enumeration of the areas and kinds of activities performed by the attorneys of my firm as part of the Troika in connection with the prosecution of the subscriber actions and which contributed substantially to the class action settlement.

5. Both prior and subsequent to the action of the Judicial Panel on Multidistrict Litigation, my firm played one of the more significant roles in arranging and promoting the coordination among plaintiffs' counsel which brought some measure of order and direction to the activities of plaintiffs' counsel. In the very preliminary stage of this litigation in the Southern District, the defendants moved pursuant to Rule 12 (f) to strike parts of plaintiffs' complaints. This resulted in numerous and diverse presentations by various plaintiffs' counsel representing various and conflicting arguments. A simple cosmetic motion imposed on Judge Cooper an avalanche of papers and a small army of attorneys at the argument. The subsequent coordination which we helped promote resulted in a unified, consistent and joint position on behalf of subscriber plaintiffs, including the above-captioned three class actions. My firm's activities in connection with bringing about this coordination included, among other things, the following:

(i) helped organize and conduct the plaintiffs' counsel meetings and conferences;

(ii) provided substantial familiarity with the background of the proceedings based upon our early completion of

(a) legal research re scope and effect of Judge Wyzanski's findings;

(b) research re records of proceedings before Judge Wyzanski on remand, in Washington, D.C. (1967);

(c) examination and analysis of entire record in government case (1967);

(iii) organized and conducted the meeting of plaintiffs' counsel at the Statler Hotel in Washington on August 7, 1968, setting up coordination among plaintiffs' counsel in accordance with the request of the Judicial Panel on Multidistrict Litigation;

(iv) participated in organizing and conducting the meetings among plaintiffs' counsel which resulted in the establishment of the Troika;

(v) since Pre-Trial Order No. 1 dated July 2, 1969, establishing the Troika, in addition to the substantive activities enumerated below, my firm, together with the other firms constituting the Troika, has engaged in considerable activities which were essentially administrative and procedural in connection with the basic objective of promoting uniform and consistent approach.

A review of the records of my firm shows that our activities as above described involved the expenditure of several hundreds of

hours (constituting part of the thousands of hours expended) by attorneys of my firm, which includes myself, Lewis M. Dabney, Jr., Esq., and various associates.

6. With the possible exception of the activities with respect to the statute of limitations motion more specifically set forth below, the most significant activity in connection with the prosecution of these cases by my firm and the Troika was the institution and promotion of plaintiffs' uniform pre-trial discovery requests. This pertained both to the plaintiffs' uniform first set of interrogatories and to the plaintiffs' unified Rule 34 application. To accomplish this work, the Troika designated a discovery subcommittee on which I and Mr. Dabney of my firm played a leading part. Manifestly, the conduct of discovery under the aegis of the Troika, in which we also played a leading role, made possible the trial preparation and the advance of these cases to the posture in which the settlement of the above-captioned class actions was made possible. This is recognized by the disingenuous suggestions in Paragraph 6 of the "Petition of Counsel for the Class Representatives for Award of Counsel Fees and Costs", where petitioner claims credit for participation in plaintiffs' discovery activities and drafting the motion for the production of documents. In point of fact, the laboring oar in connection with the preparation of the Rule 34 application was carried by my firm. Significantly, we had prepared the Rule 34 applications very promptly and forwarded our applications to Mr. Berger's firm on July 24, 1968, before the class action cases were transferred to New York. A copy of my letter is attached as Exhibit A. Thereafter petitioner did, along with the members of the Troika, participate in refining the Rule 34 requests into the document eventually

served upon the defendants.

It is a matter of interest that Mr. Berger's firm may never have entered this litigation but for me. By coincidence, I met Herbert B. Newberg, Esq. of that firm in or about October, 1967. In the course of conversation, I mentioned the litigation I had instituted on behalf of several plaintiffs in connection with Central Station Protection Services. Shortly thereafter, Mr. Newberg wrote to me under date of November 7, 1967, stating in part:

> "You mentioned that your office was involved in representing plaintiffs against the manufacturers of burglar alarms who are charged with antitrust violations. We represent some clients who may have claims arising from purchases of burglar alarms and would appreciate it if you would send us a copy of the Complaint which you filed in that action together with a brief explanation as to the status of this litigation."

I responded promptly, complying with his request, by my letter dated November 9, 1967, wherein I wrote in part:

> "In accordance with your request, I am enclosing a copy of the complaint filed in Allied Stores Corporation, et al. v. Grinnell Corporation, et al. We have instituted discovery procedures and a conference among plaintiffs' counsel and defendants' counsel is scheduled in the near future.

Copies of said letters are attached as Exhibits B and C.

7. On or about June 10, 1969, the defendants moved for partial summary judgment based upon the statute of limitations in the three class actions as well as many of the other actions. In essence, they sought a determination which would

have limited the period which the class actions covered to the four years prior to the date of the filing of the complaints herein on July 10 and 11, 1968, rather than back to at least April 13, 1957, a period of 11 years (not 4 years). I was the attorney principally in charge of the development of the factual matters set forth in opposition to that motion on behalf of all subscriber plaintiffs, including those in the class actions. The only affidavit (with accompanying supporting exhibits) submitted on behalf of the plaintiffs on that motion was my affidavit sworn to August 1, 1969. In addition, my firm joined with other members of the Troika and other counsel in preparing the memoranda and arguments and briefs in opposition to the defendants' motions in this District Court and in the United States Court of Appeals for the Second Circuit, as well as in opposition to the defendants' petition for certiorari to the United States Supreme Court. While counsel of record for the class actions did join in, their role was minor. We disagree with petitioner's suggestion (Petn. ¶9) that his firm's activities in connection with this application to the Court of Appeals were of particularly great moment. Mr. Berger's slight participation before the Court of Appeals was a matter of surprise and distress to me and to the several counsel who spent many hours in preparation for that argument. Those of us who had developed a uniform presentation and agreed upon a single counsel to present the argument on behalf of the plaintiffs had no advance knowledge that Mr. Berger intended to participate, as developed on the morning of the argument, notwithstanding his lack of any participation in the development of the argument which was coordinated and spearheaded by the Troika. The actively participating counsel had agreed that the objectives of the appellees would be best served by a single counsel representing the argument developed by us and having a member of the Troika, Barry J. Brett, Esq., present at the counsel table to assist and represent any interest of the subscribers which might be required.

I was present at the argument before the Court of Appeals, and it is my opinion that Mr. Berger did not add any meaningful contribution to the favorable result reached. Furthermore, virtually all of the analyses, research and drafting in connection with the brief in opposition to defendants' petition for certiorari to the United States Supreme Court was done by the Troika. My firm spent several hundreds of hours in connection with the work on the statute of limitations problem.

8. Aside from the general categories of coordination, discovery and statute of limitations activities referred to above, my work and the work of my firm in connection with its Troika responsibilities included:

(i) Legal research re such items as pre-trial discovery, requests to admit, fraudulent concealment, interrogatories, estoppel, and prima facie effect of the government proceeding.

(ii) Frequent conferences, telephone calls and meetings with plaintiffs' attorneys and, as required, with defendants' attorneys, during 1967, 1968, 1969, 1970 and 1971.

(iii) Study of contract data reports, competition reports, and other documents secured in Washington.

(iv) Frequent communication with and submission of drafts to other members of the Troika and analysis of and comments with respect to materials submitted by them.

(v) Concentrated activity in the discovery subcommittee of the Troika and, in connection therewith, with other plaintiffs' attorneys, keeping them advised (including counsel of record for the class actions).

(vi) Research and conferences in connection with the damage subcommittee of the Troika.

(vii) Substantive and tactical reports at the various plaintiffs' counsel conferences prior to pre-trial hearings.

(viii) Attendance at each of the court pre-trial hearings prior to Pre-Trial Orders numbered 1 through 6, the first one being dated July 2, 1969, and the sixth one being dated February 5, 1971.

It was by Pre-Trial Order No. 1, dated July 2, 1969, that this Court designated the Troika. Such order provided in part:

> "All subscriber plaintiffs will be represented by Weil, Gotshal & Manges, by Ira M. Millstein; Parker, Chapin & Flattau, by Barry J. Brett; and Liebman, Eulau, Robinson & Perlman, by Herbert Robinson, as lead counsel. Liaison counsel will be Parker, Chapin & Flattau."

Thus, the Troika, which up to that point had been acting on an informal basis, was formalized by order of this Court. I had participated in the activities which were the Troika's responsibilities both before and subsequent to such formalization (having been in this litigation since 1967).

(ix) Work performed in connection with the decision of Judge Metzner dated September 19, 1969, in Damon Alarm Corp. et al. v. American District Telegraph et al., pertaining to the amendment of some 24 complaints dealing with AFANY.

(x) Work preliminary to the letter dated July 24, 1969, by Barry J. Brett to this Court, advising of the disposition by

agreement of counsel with respect to motions filed June 9, 1969, except with respect to matters pertaining to AFANY.

(xi) Motions made August 20, 1970, and stipulation and order substituting "AFA Protective Systems, Inc. in place of Automatic Fire Alarm Co. of Delaware and Automatic Fire Alarm Co." and pertaining to the consolidation and merger of those companies and the decision of Judge Metzner thereon.

(xii) Repeated circularization of drafts, and revisions of drafts, of letters and other documents pertaining to all plaintiffs' cases.

(xiii) Preparation for conferences and meetings with Judge Metzner.

(xiv) Participation in the drafting and dispatching of various follow-up letters (and data on which they were based) to defendants pertaining to the production of documents under Rule 34 and the delivery thereof to Morgan Manhattan Storage Warehouse for study by all plaintiffs, first at 205 Pearl Street and then at 76 Varick Street.

(xv) Participation in the drafting and dispatching of various follow-up letters (and data on which they were based) to the defendants to comply with the answers

required by the uniform interrogatories served under Rule 33.

(xvi) Formulation of proposals to the Court for detailed scheduling and completion of all pre-trial matters.

9. The foregoing is not a complete listing of the numerous items which were taken care of by my firm and the other members of the Troika, but rather is intended to be a partial listing indicative of the tremendous activity on our part from the year 1967, in 1968, in 1969, in 1970, and up to the issuance of Settlement Order No. 1 on December 13, 1971. Such work involved the expenditure of several thousand hours by me personally and Lewis M. Dabney, Jr., Esq. (graduate of Harvard Law School, Class of 1924), and since June 6, 1971, by Nathaniel Fensterstock, Esq. (Columbia Law School, Class of 1937, who had retired after 24 years of service as Chief of the Litigation and Condemnation Division and Senior Attorney of the Port of New York Authority, and who since that time is counsel to my firm), and also by certain associates.

Although it may be repetitive of the listing included above, it is important to point out that the Troika made it possible to have coordinated uniform interrogatories, coordinated uniform production of documents, coordinated activities with the defendants' attorneys, coordinated uniform research, coordinated uniform memoranda and briefs, and coordinated activity, which is really what placed all this litigation (including the three class actions) in the state in which it became possible for David A. Berger, P.A. to negotiate the settlement.

10. The settlement, by its express language, was applicable to many classes of plaintiffs, including all of the individual subscriber plaintiffs who were represented by counsel other than the firm of David A. Berger, P.A. The language of the settlement agreement expressly covers all of the approximately 59 subscriber actions, whereas Mr. Berger's firm was counsel of record in only three of such actions. I am informed, and verily believe, that some subscribers which brought private actions did not "opt out" of the classes. When the settlement fund was negotiated, the classes described included all 59 who had brought private actions and on whose behalf the Troika had acted, including the class action plaintiffs. Therefore, it was possible for the attorney of record in the three class actions to urge upon the defendants a much larger settlement fund because the settlement agreement thus covered the other (approximately) 56 actions. Neither he nor the defendants could possibly have known, at the time the settlement amount of $10,000,000.00 was agreed upon, which of these other 56 plaintiffs would elect to "opt in" and which would elect to "opt out". Obviously, if the scope of the classes provided for in the settlement had not covered these 56 other actions, which had been aided by the Troika and some of which have "opted into" the class, the amount the defendants would have been willing to pay into such settlement fund would presumably have been less. Thus, for this reason also, the coordination resulting from the activities of the Troika enabled the amount of the settlement fund to be accordingly increased. In other words, the work done by the Troika furnished a platform from which Mr. Berger's firm was able to proceed (1) to negotiate a settlement and (2) to effect a settlement in its undoubtedly increased amount, i.e., $10,000,00

11. I am informed, and verily believe, that the complaints utilized in the above-captioned class actions (68 Civ. 4026, 68 Civ. 4027, and 68 Civ. 4028) (with the exception of the first two pages and the last two pages beginning at approximately page 21) are xerox copies of the complaint in 68 Civ. 2766, The Port of New York Authority v. Grinnell Corporation, et al., instituted July 8, 1968, just prior to the institution of the class actions on July 10 and 11, 1968. Comparison shows that they are xerox copies of the pages of the Port Authority complaint, except for the top pages and the last two or three pages of each such complaint - the prayer for relief. This is confirmed by Nathaniel Fensterstock, Esq. (counsel to my firm since his retirement from the Port Authority in June 1971). Indeed, comparison of each of such complaints with the Port Authority complaint shows that they are picture copies, with short pages where there are short pages, short lines where there are short lines, etc.

12. Whatever work was done by the firm of David Berger, P.A. was as one of many attorneys in the some 60 to 80 litigations involved in these violations of the antitrust laws. It would not be equitable to give the entire attorneys' fee in this settlement to David Berger, P.A., where, as here, the Troika did so much to make it possible. To state it differently, the creation of this settlement fund was not due only to the efforts of counsel of record in the class actions, but also, in large measure, to the efforts of the Troika. The hours spent by the Troika are far in excess of those that could possibly have been spent by counsel of record in the class actions. The Troika truly helped to create the settlement fund and should share in any attorneys' fees granted in connection therewith.

From the inception of the Troika there were discussions at various conferences of plaintiffs' counsel concerning the compensation which would be paid to the Troika for its services in undertaking the laboring oar on behalf of all plaintiffs. I recall

that a representative from Mr. Berger's firm was present at a number of these meetings. [illegible]e present agreed, expressly in some cases, tacitly in others, that the Troika should receive special compensation, which was recognized in the discussions in a pre-trial conference before Judge Metzner on December 3, 1969. While various proposals were advanced and discussed with respect to the appropriate compensation to be paid to the Troika, no precise formula was ever reached. However, all participants recognized that such compensation would be equitable.

13. There is no question about the abilities and standing of the three law firms constituting the Troika:

Weil, Gotshal & Manges;

Liebman, Eulau, Robinson & Perlman; and

Parker, Chapin & Flattau.

14. To the extent that the results achieved were favorable to the interests of the class members, they were in a large part made possible by the Troika.

15. The enforcement of the antitrust laws in this case was due largely to the contributions of the Troika and was not due solely to the efforts of counsel of record for the class actions, for the reasons indicated above and in the accompanying affidavits.

16. Had it not been for the successful efforts of the Troika in defeating the defendants' attempt to limit the scope of the damage claims via their motion for partial summary judgment on the basis of the statute of limitations - had it not been for the Troika's efforts in formulating appropriate demands for production of documents and interrogatories - had it not been for the Troika taking all the other pre-trial steps which it

did, the class action attorneys would not have reached the settlement when they did, in the amount they did, and with the lesser and minimal work effort involved on their part.

17. To a large extent, counsel of record for the class actions has relied on the efforts of lead and liaison counsel. The Troika carried the laboring oar in advancing the cases to the state where it was possible to reach a settlement in the class actions. While we acknowledge the contribution made by Mr. Berger's firm herein, I submit that appropriate recognition thereof may be made in the allocation of counsel fees.

18. I respectfully submit that this Court should take all these facts and circumstances into account in deciding the attorneys' fee to be awarded and to conclude that a maximum of 20% of the gross settlement fund of $10,000,000 would be an adequate attorneys' fee and that the Troika receive an award of at least 25% of whatever amount is awarded as counsel fees.

Herbert Robinson

Sworn to before me this
8th day of May, 1972.

Alan Paul Ansell
Notary Public

ALAN PAUL ANSELL
Notary Public, State of New York
No. 41-0023165
Qualified in Queens County
Commission Expires March 30, 1973

July 24, 1968

Herbert B. Newberg, Esq.
Messrs. Cohen, Shapiro, Berger, Polisher & Cohen
Philadelphia Saving Fund Building
Philadelphia, Pa. 19107

Re: Allied Stores Corporation, et al
v. Grinnell Corporation, et al

Dear Herb:

Enclosed please find copies of our Rule 34 motion and of our interrogatories under Rule 33 in the Allied Stores case. They are substantially similar to those we have served in two of the other cases in which we represent plaintiffs (out of a total of six separate plaintiff groupings).

I hope that these will prove helpful. In any event let me know of any developments in the Philadelphia litigation.

Best personal regards.

Sincerely,

Herbert Robinson
For LIEBMAN, BULAU, ROBINSON & PERLMAN

HR/Z
Encl.

1127

EXHIBIT A

LAW OFFICES

Cohen, Shapiro, Berger, Polisher and Cohen

ALBERT M. COHEN
1923-1956

ABRAHAM L. SHAPIRO
SYLVAN M. COHEN
REUBEN E. COHEN
ALBERT STEINBERG
IRVING L. SPECTER
ROBERT FREEDMAN
BENNETT L. AARON
E. BURTON KERR
MARK K. KESSLER
HAROLD GREENBERG
RICHARD S. LAGEN
PHILIP M. BRANDT

EDWARD M. POLISHER
DAVID BERGER
PHILIP M. SNICKMAN
SAMUEL M. LANOY
NORMAN C. HENSS
NATHAN M. FEINSTEIN
SIDNEY MARGULIES
HERBERT B. NEWBERG
MAYOR SHANKEN
M. LADDIE MONTAGUE, JR.
MURRAY A. ZATMAN
HOWARD L. SCHAMBELAN

TWENTY-SECOND FLOOR
PHILADELPHIA SAVING FUND BUILDING
PHILADELPHIA, PA. 19107
(215) MA 2-4300

WASHINGTON OFFICE
SUITE 300
1900 PENNSYLVANIA AVENUE

CABLE ADDRESS
COSAC

November 7, 1967

Herbert Robinson, Esquire
Liebman, Eulau, Robinson & Perlman
32 E. 57th Street
New York, New York

Re: Burglar Alarms Antitrust

Dear Mr. Robinson:

I enjoyed meeting and talking with you during the recent 150th Anniversary of Harvard Law School. I found that entire weekend restful and trust that you found it likewise.

You mentioned that your office was involved in representing plaintiffs against the manufacturers of burglar alarms who are charged with antitrust violations. We represent some clients who may have claims arising from purchases of burglar alarms and would appreciate it if you would send us a copy of the Complaint which you filed in that action together with a brief explanation as to the status of this litigation.

With best wishes,

Sincerely,

Herbert B. Newberg

Herbert B. Newberg

HBN/mh

1128

EXHIBIT 8

November 9, 1967

Herbert B. Newberg, Esq.
Cohen, Shapiro, Berger, Polisher and Cohen
Philadelphia Saving Fund Building
Philadelphia, Pennsylvania 19107

Dear Mr. Newberg:

Thanks for your letter of November 7. I have been keeping in mind our promise to communicate with each other, so I am glad that you pressed the button to spur me on.

In accordance with your request, I am enclosing a copy of the complaint filed in Allied Stores Corporation, et al. v. Grinnell Corporation, et al. We have instituted discovery procedures and a conference among plaintiffs' counsel and defendants' counsel is scheduled in the near future. Issue has not been joined and we have granted the defendants their fourth or fifth extension of time to answer.

Please let me know what action your firm takes in this matter.

I hope that you will see fit to call me when you are in New York.

Sincerely yours,

Herbert Robinson
for LEHMAN, LULAU, ROBINSON & PERLMAN

HR:CM

Enclosure

1129 EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.,	:	68 CIV. 4026 (E.D. PA. CIV. 68-1478)
v.	:	
GRINNELL CORPORATION, et al.	:	
MANHATTAN-WARD, INC., et al.,	:	68 CIV. 4028 (E.D. PA. CIV. 68-1480)
v.	:	
GRINNELL CORPORATION, et al.	:	
1225 VINE STREET BUILDING, INC., et al.	:	68 CIV. 4027 (E.D. PA. CIV. 68-1479)
v.	:	
GRINNELL CORPORATION, et al.	:	

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

M. WADE KIMSEY, being duly sworn, deposes and says:

1. This affidavit is submitted to confirm to this Court that the "Troika", which was officially designated by this Court in Pre-Trial Order No. 1, dated July 2, 1969, wherein it was provided:

> "All subscriber plaintiffs will be represented by Weil, Gotshal & Manges, by Ira M. Millstein; Parker, Chapin & Flattau, by Emery J. Reath; and Liebman, Kalish, Robinson & Perlman, by Herbert Robinson, as lead counsel. Liaison counsel will be Parker, Chapin & Flattau."

has diligently performed its responsibilities throughout the ye

1969 through 1971, organizing, coordinating and pursuing the substantive and administrative pre-trial measures required to perform their functions in behalf of all subscriber plaintiffs, including the three captioned class actions.

2. I am personally familiar with the facts involved in these actions because the law firm with which I am associated, Gould & Wilkie, Esqs., is counsel of record in an individual action which it instituted in 1967 in the Southern District of New York in behalf of one of the subscriber plaintiffs, Associated Dry Goods Corporation (Associated Dry Goods Corporation et al. v. Grinnell Corporation, et al., 67 Civ. 2606). I have thus been associated with the activities of the coordination by plaintiffs' counsel both before the formalizing of the Troika in 1969 and since that time.

3. Without any doubt, such Troika activities which I have witnessed personally by attendance at meetings, conferences, telephone calls, receiving and dispatching correspondence, etc., has substantially aided all of the some 60 plaintiff subscriber actions, including the above-captioned three class actions.

4. Were it not for the sustained and successful efforts of the Troika in defeating the defendants' motion for partial summary judgment on the basis of the statute of limitations, and the Troika's sustained efforts in formulating and spearheading the demands for unified production of documents and interrogatories, and the numerous other pre-trial steps which it successfully progressed, the status of the cases would not have reached the state in which they were, thereby permitting

the class action record attorneys to reach the settlement point when they did and in the amount they did. Were it not for the Troika, the class action record attorneys would have been required to perform a much greater amount of work.

5. Since counsel of record for the class actions has thus benefited from their reliance on the efforts of the lead and liaison counsel - the Troika - aside from whatever contribution counsel of record for the class actions may have made, it is submitted that proper recognition of the work of the Troika in helping to progress the cases to the state where a settlement could be negotiated in the amount currently before the Court, should be made by allocation from the settlement fund of part of the counsel fees to the Troika.

M. Wade Kimsey

Sworn to before me this
2nd day of April, 1972.

Notary Public

(Seal)

JOHN F. BOYER
Notary Public, State of New York
No. 31-5405100
Qualified in New York County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.

v.

GRINNELL CORPORATION, et al.

68 Civ. 4026
(E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al.

v.

GRINNELL CORPORATION, et al.

68 Civ. 4028
(E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al.

v.

GRINNELL CORPORATION, et al.

68 Civ. 4027
(E.D. Pa. Civ. 68-1479)

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ALVIN M. STEIN, being duly sworn, deposes and say:

1. I am a member of the firm of Parker, Chapin and Flattau, which since June of 1969 has served as liason counsel with respect to all actions pending before this Cou for treble damages brought by subscribers to the central station protection services provided by certain of the defendants. My firm, along with the firms of Liebman, Eula Robinson & Perlman and Weil, Gotshal & Manges, have formed the "Troika" which has acted as lead counsel on behalf of al of these subscriber actions.* These last-mentioned actions are brought under the antitrust laws of the United States a charge inter alia that the defendants monopolized the provi ing of accredited central station protective services in th

*The appointments of lead and liason counsel for all subscriber plaintiffs were made in paragraph 1 of Pre-Trial Order No. 1 of Judge Metzner dated July 2, 1969.

United States. The actions were based in whole or in part on an action entitled United States v. Grinnell Corp. in which reported decisions were entered by the United States District Court for the District of Rhode Island, 236 F. Supp. 244 (D. R.I. 1964), and the United States Supreme Court, 384 U.S. 563. A subsequent unreported decree was entered in the District of Rhode Island. Included within the actions on whose behalf we have acted are the above-captioned class actions, the settlement of which is presently before the Court. The within affidavit is submitted in support of an application to award (i) total counsel fees in the above-captioned class actions, in a sum which does not exceed 20% of the gross settlement approved by this Court and (ii) the Troika an amount which is not less than 25% of the amount ultimately awarded as total counsel fees herein. It is the gravamen of this application, that it is here appropriate to limit the total counsel fees awarded and apportion them in the light of the facts more particularly shown below and in the other affidavits and memoranda submitted in support of this application since it is clear beyond cavil that:

(a) The activities of the Troika have conferred substantial benefits upon the class and made possible the settlement reached in the amount presently before the Court;

(b) Counsel of record for the class actions (hereafter referred to as "Petitioner") has been able to limit their activities in the prosecution of the actions and rely upon the Troika;

(c) The diligence and initiative which spurred the private enforcement of the antitrust laws is not attributable to Petitioner but rather to the Troika;

(d) Fairness and equity do not justify depriving the members of the class* of $2,500,000 or of awarding the

*My firm and each of the other firms in the Troika represent claimants which have filed proofs of claim in the class.

entire sum determined to be an appropriate counsel fee to attorneys whose activities were not the most significant in creating the fund.

2. The above-captioned cl actions are but thr of the approximately 65 actions brought on behalf of companies which subscribed to the central station protection services provided by the defendants ADT, Holmes Electric Protective Services and Automatic Fire Alarm. By order date October 2, 1968, the Judicial Panel on Multidistrict litigation ordered that all but two cases brought against these defendants and the Grinnell Corporation which were pending i various District Courts were to be assigned to the Honorable Judge Charles M. Metzner of the Southern District of New Yor pursuant to 28 U.S.C. §1407.* In addition to the cases brought by subscribers, there were transferred to this Court certain additional actions brought by competitors of the above defendants. The approximately 80 actions which were pending in the Southern District of New York as a result of either their commencement in that Court or the action of the Judicial Panel on Multidistrict Litigation were all assigned to Judge Metzner for all pretrial proceedings and, pursuant to Rule 2 of the General Rules of this Court, for all proceedings with respect to the actions commenced in the Southern District of New York.

BACKGROUND OF THE TROIKA AND REQUESTS FOR COMPENSATION

3. It was apparent from the outset of these proceedings in 1958 that the multiplicity of counsel and complexities of these cases would present administrative and substantive problems. Similarly from the outset, several counsel have been the principal moving forces in seeking to

*Certain cases not transferred were allowed to proceed in the Eastern District of Pennsylvania because of this advanced state of prosecution.

advance the cases brought on behalf of the subscribers and to bring about a favorable result for the subscribers as early as possible. Your deponent and other attorneys of my firm have been a significant force in promoting whatever progress has been made on behalf of the subscriber actions. In early 1968, my firm was among the counsel who presented briefs and oral argument to Judge Cooper in successfully opposing the defendants' motion pursuant to Rule 12(f) at an early stage in these proceedings. As will be apparent from the affidavits of Herbert Robinson and A. Paul Victor submitted in support of this application, the other firms constituting the Troika were also playing significant roles on behalf of the subscribers at this point in the actions. When a stay of proceedings was entered in these actions by order of Chief Judge Sugarman, my firm played a significant role in limiting the effect of the stay so as to minimize the delay which it necessarily caused in the progress of the actions. An attorney of your deponent's firm was designated at a meeting of plaintiffs' counsel to appear before the Judicial Panel on Multidistrict Litigation to be the single spokesman for the subscriber plaintiffs requested by the Panel.

4. Subsequent to the assignment of these cases to Judge Metzner, a pretrial conference was called by the Court for June 17, 1969. In anticipation thereof, the Court directed that there be designated lead or liason counsel for the two groups of plaintiffs involved to facilitate the advancement of these cases. (Transcript of hearing in United States v. Grinnell et al. dated June 17, 1969, page 6; Attached hereto as Exhibit 1 are pages 6-9 of that transcript) On that date, the Court was advised that at a meeting among counsel for the various subscriber plaintiffs, it had

been determined that lead counsel would consist of your deponent's firm, Parker, Chapin and Flattau, and the firms of Liebman, Eulau, Robinson & Perlman and Weil, Gotshal and Manges. (Transcript, pages 6-9) Your deponent's firm was thereafter designated to serve as the single firm among the Troika through which the Court or others could direct communications to all plaintiffs' counsel. Included among the actions on whose behalf the Troika was serving were the within class actions. These roles were memorialized in Pretrial Order No. 1 dated July 2, 1969, paragraph 1.

5. Even prior to the formalization of the appointment, it had become apparent that the three firms which would constitute the Troika would carry the laboring oar in prosecuting the actions. The order of July 2, 1969 served to formally add substantial administrative responsibilities to the substantive activities already thrust upon us. The Troika quickly recognized the dimensions and nature of the task and have from the outset advised all subscribers' counsel that we believe it appropriate that we be compensated by subscriber plaintiffs or their counsel for our activities on behalf of the entire group. Your deponent verily believes that counsel of record for the within class actions were present on various occasions when these requests were put forward and at least tacitly, if not more affirmatively, consented to our request. Various proposals with respect to computing and determining the appropriate compensation were reviewed and discussed but no precise formula was determined or agreement reached. Indeed the minutes of a pretrial conference of December 3, 1969 in Allied Stores, et al. v. Grinnell demonstrate that compensation for lead and liason counsel was contemplated by the Court and counsel from the outset of these proceedings. (Tr., pp. 5-12)

6. There is set forth below a partial summary of the areas in which the work of the Troika was particularly significant in generating the fund presently before the Court for approval. With respect to the initiation and prosecution of the discovery application which were the most significant factors in the progress of these cases, it was the Troika that was responsible. Similarly, the Troika played the most significant role on behalf of subscribers in opposing the defendants' motion for summary judgment based on the statute of limitations. In these and other respects the Troika was far more responsible for the result reached than was Petitioner.

DISCOVERY

7. The service of detailed interrogatories and requests for the production of documents has resulted in the availability to the subscriber plaintiffs of much of the material necessary for the trial preparation which advanced these cases to the point at which the agreement for settlement of the class actions was reached. As is set forth in greater detail below, the Troika was primarily responsible for the development, preparation, review and compliance with the subscriber plaintiffs' discovery. Indeed, subsequent to the service of our discovery requests, my firm has been instrumental in bringing about such compliance with our requests as has been received by repeated requests to opposing counsel and several applications to the Court. A review of the records of my firm reveals that we commenced work on the preparation of interrogatories in November of 1968. During the following months, well over 100 hours were spent by attorneys in my office in connection with the preparation of the interrogatories served on behalf of all subscriber plaintiffs on the defendants. The interrogatories as finally

filed were completed and served by my office after being signed by your deponent on behalf of all subscriber actions. Our activities in connection with the interrogatories included investigations of law; preparation of various drafts of interrogatories; circulating various drafts; receiving comments from numerous persons; coordination and discussion of all of these comments; organization and conduct of meetings to review approaches to discovery; preparation for and attendance at meetings with defendants' counsel to review and revise outstanding discovery pursuant to direction of the Court and Rule 9 of the General Rules of this Court; circulation and reviews of responses; written and oral applications to the Court to compel compliance and numerous related activities. These efforts involved extensive related administrative activity and the advancement of substantial sums for duplicating, postage and other related expenses. In addition, through this period many additional hours were expended performing similar functions with respect to the preparation of a request for a production of documents pursuant to Rule 34. These discovery applications were served in all actions brought by subscribers (except the United States of America), including the class actions, and resulted directly in the availability to the plaintiffs of the facts and documentary evidence which has made possible considerable trial preparation of these cases and the progress of the actions which facilitated the settlement of the class actions. In addition, your deponent's firm spent approximately 75 hours in successfully opposing on behalf of all subscribers, including the class actions, an application brought by the defendant Automatic Fire Alarm with respect to our discovery requests. In connection with that application, we undertook investigation of law with respect to the discovery application, collection and review of documentary materials

eventually submitted to the Court in opposition to the motion; preparation of affidavits and legal memoranda; circulation of proposed submissions on the application; and discussion and integration of comments received. In fact, and contrary to paragraphs 6-8 of the Petition in Support of Fees sworn to the 20th day of April, 1972 (hereinafter referred to as the Petition), the discovery application so served was not a joint filing by subscribers and competitors but was served solely on behalf of subscribers.* Accordingly an even heavier burden fell on the Troika than would appear from the Petition since we were not aided by competitors' lead counsel at this point in the proceedings.

STATUTE OF LIMITATIONS

8. In the summer of 1969, the defendants moved for partial summary judgment based upon the statute of limitations in many of the subscriber actions. As is recognized by Petitioner in paragraph 9 of the Petition, the determination on this application was critical to the class actions. The favorable result considerably broadened the applicable period for which damages could be secured by members of the class. Had we not prevailed, recovery in the class actions could have been limited to the four years immediately preceding the filing of the complaints in July of 1968 rather than at least an eleven year period beginning in 1957. In July and August of 1969, your deponent's firm was one of those principally involved in the substantive and administrative activity involved in preparing the papers in opposition to the motion which were eventually submitted on behalf of the plaintiffs. In that connection, our activities included the attendance at preliminary discussions relating to the

*As noted, the interrogatories filed herein are signed by your deponent as a member of the firm of Parker, Chapin and Flattau on behalf of all subscribers except the United States of America.

motion; investigations of law and reviews of various authorities; participation in the preparation of drafts of the affidavit in opposition submitted on behalf of the plaintiff; circulation of various documents and receipt and analysis of comments; numerous reviews of drafts and participations in numerous conferences revising and refining the drafts which resulted in the brief submitted to the District Court on the application. The end product in the District Court was the result of drafts and documents prepared by numerous counsel which were finally pulled together into a working draft which formed the basis of our memorandum.

9. Subsequent to the favorable determination in the District Court, your deponent's firm principally prepared the order and submission in support thereof presented to the District Court in connection with the determination. The Petition in paragraph 9(c) incorrectly states that the Court "sua sponte, certified for appeal...its interlocutory order denying summary judgment." In fact, the question of certification was argued by both sides and extensively discussed among all counsel who were directly involved in the substantive aspects of the matter. The submission in opposition was basically prepared and sent by my firm. Attached hereto as Exhibits 2 and 3 respectively are the submissions in support of and in opposition to certification. Here again, Petitioner's participation was not significant in contrast to the role of the Troika. In connection with opposing certification, my firm engages investigations of law and drafting efforts as well as various conferences and circulating documents.

10. In successfully opposing the appeal of the defendants to the Court of Appeals, your deponent's firm and the Troika again played the lead role in the preparation of

the appellees' (including the Class Actions) memorandum and oral argument. It is particularly significant in this regard to note that Petitioner disengenuously asserts he "argued the case in the Court of Appeals on behalf of the three above-captioned class actions and for others.", while noting that "One counsel for certain competitor plaintiffs also presented oral argument." (Petition, paragraph 9(c)) In fact, the various counsel (not including Petitioner) who spent long hours in preparing the presentation on behalf of the plaintiffs had spent considerable time discussing the most effective manner of presenting our oral argument to the Court. David Berger who would depict himself as the principal oral advocate for subscribers never attended any of the conferences relating thereto. These conferences and discussions resulted in unanimity on the form and content of our most effective uniform presentation after a thorough review of the various substantive problems which could arise. In addition, it was unanimously determined that it would be most effective for a single oral presentation to be made on behalf of the appellees. After considerable discussion, all of the firms involved agreed that in seeking to achieve the end of most effective oral presentation, a single counsel, Joel E. Hoffman, Esq., of Washington, D.C. representing a competitor, would present the oral argument on behalf of the appellees. All counsel further agreed that Barry J. Brett of my firm, as the counsel most familiar with the matter among subscriber counsel, would be present at the counsel table during the argument to assist Mr. Hoffman and to represent any possible diverse interests of subscribers which arose during the course of the argument. All subscriber counsel, including Petitioner, knew or should have known of this arrangement and apparently acquiesced therein in accord with the aforesaid

uniform objective of securing the best possible results. Notwithstanding the foregoing, on the morning of the argumen in the Court of Appeals for the Second Circuit, the involved counsel were advised for the first time that David Berger proposed to address the Court of Appeals which h: in fact di This eleventh hour announcement and participation was not based upon or consistent with the long hours of preparation by many counsel who were intimately involved and familiar with the case and did not materially aid, affect, alter or influence the favorable result which we secured in the Court of Appeals.

11. Thereafter, attorneys of your deponent's firm prepared the initial draft of our successful brief in opposition to the defendants' application to the Supreme Court for a Writ of Certiorari. We spent additional hours and attende conferences in reviewing and revising the draft and accommodating various counsel. The burden fell even heavier on the Troika at this point since we no longer were aided by certai of the competitors' counsel who had participated extensively in the District Court and Court of Appeals. Hundreds of hours were expended by your deponent's law firm in connectio with the various substantive and administrative activities incident to the successful opposition to the defendants' motion for partial summary judgment based upon the statute of limitations.

MOTION WITH RESPECT TO AFA

12. Another substantive matter which required a presentation on behalf of the plaintiffs was the response to the motion made by the defendant Automatic Fire Alarm based upon its change of name and corporate status. Here again t plaintiffs prevailed after many hours of work. As a result of coordination principally precipitated by your deponent's

firm, a uniform presentation and motion was made on behalf of all subscriber plaintiffs. In paragraph 10 of the Petition it is urged that Petitioner was somehow responsible for this result. In fact, a considerable part (if not all) of the efforts expended by Petitioner was redundant of efforts performed on behalf of the class as a group and motion papers filed on behalf of all subscriber plaintiffs. Indeed, subsequent to the filing of the motion papers by Petitioner, the Court advised your deponent's firm that we should thereafter assiduously seek to avoid the submission of repetitious papers since the presentation made by Petitioner merely added to the Court's burden of analyzing the submission. The Court later described these additional burdens imposed as being "deluged with a bunch of mimeographed papers, and I was sent four sets of motions, none of which had to be made." (Transcript of December 3, 1969, pp. 5 and 18) Your deponent verily believes that these mimeographed papers are those which Petitioner refers in Paragraph 10 of the Petition as their "Motion To Amend."

13. In addition to the specific matters referred to above in which the activities of the Troika were of at least equal benefit to the class as those of Petitioner, although relied on by Petitioner in their application for a fee, we have performed numerous other services and functions which were of significant benefit to the class and aided in bringing about the settlement here reached. Perhaps most significant in this regard is our expertise and familiarity with the actions which facilitated the progress made. The members of the Troika were among those counsel which had promptly addressed themselves to the issues and problems here present and thereby provided the knowledge which has been critical in the making of our substantive decisions and

strategy. (See Affidavit of Herbert Robinson which demonstrates the stage of the proceedings prior to the commencement of the Class Actions by Petitioner and the manner of preparation of the Complaints therein.) Accordingly, our activities included the continual coordination and initiation of steps taken to protect the interests of all subscriber plaintiffs including the class action plaintiffs. We have regularly and assiduously sought to bring about the complete response to our discovery requests. This has entailed considerable administrative and substantive activity and the advancement of large sums in disbursements. We have regularly circulated communications from other plaintiffs' counsel, from defendants' counsel and from the Court and prepared draft and final presentations to the Court and other counsel. On each occasion when a pretrial conference was held before the Court, the principal representative for all subscriber actions (including the class actions) was from the Troika and this has necessitated extensive preparation for each conference. Each conference among plaintiffs' counsel was initiated by and conducted by a member of the Troika, which again involved extensive preparation. Both before and after the class action settlement, we have been the recipient of frequent inquiries from plaintiffs' counsel as to matters relating to the actions in general and the class actions in particular. In fact, we have received and responded to questions from numerous plaintiffs' counsel with respect to aspects of the class action settlement when inquiries to Petitioner were reportedly unavailing.

CONCLUSION

14. While none of the members of the Troika played any direct role in the preparation or presentation of the

papers submitted to the Court in support of a determination that the class actions were appropriately brought or in the negotiation of the settlement heretofore arrived at, we have from the initiation of the litigation been intimately involved with the prosecution of the subscriber plaintiffs' actions. Our activities were critical in bringing about the favorable decisions and the discovery without which the class action settlements could not have been reached in the amount presently before the Court. It is therefore submitted that it would be fair and equitable that the Troika be compensated out of the amount awarded by this Court as total counsel fees. Accordingly, we respectfully urge that the Court take the facts and circumstances above stated into account in determining the fee to be awarded and determine that (i) not more than 20% of the gross settlement would be an adequate attorneys' fee and (ii) the Troika should receive an award of at least 25% of the total amount awarded as counsel fees for their efforts in helping to generate the fund.

WHEREFORE, your deponent respectfully urges that the Court enter an order which would (i) award as total counsel fees in the within actions a sum not in excess of 20% of the gross settlement and (ii) award to the firms of Liebman, Eulau, Robinson & Perlman, Parker, Chapin and Flattau and Weil, Gotshal & Manges a sum of not less than 25% of the total amount so awarded as counsel fees.

ALVIN M. SIBLEN

Sworn to before me this
8th day of May, 1972.
Norma M. White

DONNA M. WAITE
Notary Public, State of New York
No. 24-4170130
Qualified in Nassau County
Term Expires March 30, 1973

THE COURT: Before we start, I would like to advise counsel that when they address the Court, to please announce your name so the reporter will know who is speaking and so we'll have a record with some meaning.

I understand we have all the appearances.

I requested that counsel for the plaintiffs meet yesterday to see if they could agree upon lead counsel, or liaison counsel as it is sometimes referred to, and I wonder if any agreement has been reached upon that.

MR. HILLSTEIN: Your Honor, I am Mr. Hillstein of Weil, Gotshal & Manges. We represent, in this case, Federated Department Stores, J. C. Penney, Butler & Gartner.

We have had several meetings in our office to discuss this problem, and yesterday we came up with a tentative solution which we hope will suit the Court's idea as to what should be accomplished.

We have agreed that we would try to operate as a troika in this arrangement with two other law firms. The reason for that, your Honor, is that there are a great many plaintiffs counsel in this case. I think the weight of the

jga

work should be distributed among three law firms rather than one, and our experience in other 1407 litigation indicates that undertaking the obligation of liaison counsel is a serious undertaking that may involve a considerable amount of work.

So, rather than designating one law firm to do the entire job, we would like to urge upon your Honor the idea that our firm plus Mr. Herbert Robinson of Lieberman, Rutau, Robinson & Perlman, who represent Allied Stores, City Stores, Saks, W. T. Grant, Zayre and Grand Union, plus the Parker, Chapin & Flattau firm, represented this morning by Mr. Brett, who represents Spartan Industries, Russ Togs, Interstate Department Stores and a number of other plaintiffs, all subscriber plaintiffs incidentally, your Honor, would act as the three law firms who together will be liaison counsel. We would like to distribute the work among ourselves.

The way we visualize it, it would run something like this: We will divide among ourselves from time to time the task of appearing before your Honor on motions and other matters. Perhaps one

SOUTHERN DISTRICT COURT REPORTERS
United States Courthouse

time, this morning for example, we would like Mr. Brett to carry the laboring oar for the matters of housekeeping and other matters before your Honor, the next time perhaps Mr. Victor of my office or myself, and the next time Mr. Robinson. We would like to divide the work among the three of us. In addition, we visualize sub-contracting out some of the work to other plaintiffs' counsel from time to time.

That leaves the question of who your Honor would want to contact. I take it you would want one law firm to watch for motions and to get materials out. We are not altogether in agreement on that, but we recognize your Honor's desire in this regard.

THE COURT: I suggest the troika meet after this hearing and have a ballot and let me know as to who draws the short straw.

I think it is a good idea, actually. It is starting out as a complicated, involved litigation, and I don't see how one law firm could possibly carry the burden, and I'll accept that proposal, with your firm, Mr. Robinson's firm and Mr. Brett's firm representing the subscribers

SOUTH ATLANTIC DISTRICT COURT REPORTERS
United States Court House

plaintiffs.

MR. MILSTEIN: Yes, your Honor. And then we'll contact your Honor and tell you which one of us will be the firm to contact for liaison directly with the Court.

THE COURT: Now we have some consumer cases.

MR. KELLY: Competitor cases. My name is William Kelly, and I have been selected as the liaison counsel by all of the competitor plaintiffs.

THE COURT: What firm are you from?

MR. KELLY: Casey, Lane & Mittendorf.

THE COURT: I would suggest that counsel select one of the cases, if you have a matter affecting all of them, and make that the name one for all proceedings as we go along so that we don't have papers filed in case A and, a month or two later, papers filed under the title of case B if they deal with all the subscribers or with all the competitors.

So, if you select one of the cases which you let me know will be the case that will represent all subscribers or the case that will represent

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EXHIBIT 1

CAHILL, GORDON, SONNETT, REINDEL & OHL
EIGHTY PINE STREET
NEW YORK, N.Y. 10005
TELEPHONE 212-944-7400

WASHINGTON OFFICE
FEDERAL BAR BUILDING WEST
1819 H STREET, N.W.
WASHINGTON, D.C. 20006

EUROPEAN OFFICE
9, PLACE DE LA CONCORDE
PARIS, FRANCE

RADIO AND CABLE ADDRESSES
"COTTOFRANK NEWYORK"
"COTTOFRANK WASHINGTON"
"COTTOFRANK PARIS"

HAROLD F. REINDEL
JOHN P. OHL
CHARLES F. DETMAR, JR.
LAWRENCE J. McCAFFREY
F. ARNOLD DAUM
JEROLD C. VAN CISE
IRWIN SCHNEIDERMAN
DON S. STOOKEY
CLIFFORD L. PORTER
JOHN M. RICHARDSON
G. GARTSIDE McCANDLESS
DANIEL JAMES
OLIVER W. HAWKINS
DUDLEY C. TENNEY
WILLIAM C. MEGARRY
DENIS G. McINERNEY
WILLIAM M. SAXE
RAYMOND L. FALLS, JR.
EMANUEL KOHN

ARTHUR HERMAN
RALPH O. WINGER
JEROME OOTLE
PAUL M. FOX
DAVID INGRAHAM
J. BERNARD QUIGLEY
LOFTUS E. BECKER
WILLIAM T. LIFLAND
WALTER C. CLIFF
JOSEPH P. CONWAY
DAVID W. HYDE
RALPH C. MENAPACE, JR.
MARSHALL H. COX, JR.
THOMAS F. CURRIN
EDWARD A. HANSEN
H. RICHARD SCHUMACHER
JOHN R. YOUNG
WILLIAM L. DENNIS

EDWARD HIDALGO
PARIS, FRANCE
DONALD J. MULVIHILL
WASHINGTON, D.C.

PAUL W. WILLIAMS
FREDERICK C. HEMPHER
COUNSEL
THURLOW M. GORDON
JAMES A. FOWLER, JR.
OF COUNSEL

October 20, 1969

Re: Russ Togs, Inc., et al. v.
Grinnell Corporation, et al.

Dear Judge Metzner:

Enclosed for your consideration is defendants' proposed order effectuating your decision of October 3, 1969 denying defendants' motion for partial summary judgment. Defendants' proposed order also: (a) provides for the entry of partial summary judgment with respect to the two complaints filed after September 9, 1968, and (b) contains a statement pursuant to 28 U.S.C. § 1292(b), so as to permit an application to the Court of Appeals for an interlocutory appeal of this decision.

In the first instance, defendants ask certification of all issues raised by their motion; alternatively, we ask certification of the question whether, in view of the one-year grace period added by the 1955 amendments, plaintiffs had an additional 60-day (or "appeal time") grace period within which to take advantage of the tolling provision in § 5(b) of the Clayton Act. In both instances, defendants respectfully submit that the statutory grounds for certification are present, and that this is indeed a classic example of a controlling decision as to which "an intermediate appeal may avoid protracted and expensive litigation", Milbert v. Bison Laboratories, 260 F.2d 431, 433 (3d Cir. 1958).

1. An immediate appeal may materially advance the ultimate termination of the litigation. Six of the actions to which defendants' motion is directed are alleged class actions, and the remaining 60 actions involve hundreds of plaintiffs and a much larger number of protection service contracts executed at different times and in different circumstances. If defendants' position is well-founded, either in whole or in part, hundreds of claims based upon these individual transactions are time-barred, and a monumental waste of the energies of all concerned would result from forcing these cases to run their full course in this Court before any review of the instant decision.

Cases posing such problems, where there may be a statute of limitations defense, are precisely the kind of cases Congress contemplated would, and should, be materially advanced by an interlocutory appeal. See, e.g., S. Rep. No. 2434, 1958 U.S.C. Cong. and Adm. News, p. 5255; H. Rep. No. 1667, 85th Cong., 2d Sess., to accompany H. R. 6238 (1958); Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Rep., 85th Cong., 2d Sess., on H. R. 6238, Ser. 11; and Austrian v. Williams, 198 F.2d 697 (2d Cir.), cert. denied, 344 U.S. 909 (1952), cited throughout the legislative history.

In short, this decision presents in multiple form the problems arising when a District Court has decided a statute of limitations issue "in a manner which keeps the litigation alive but which, if answered differently on appeal, would terminate the case", United States v. Woodbury, 263 F.2d 784, 787 (9th Cir. 1959), and accordingly this decision is eminently ripe for certification.

2. The order to be entered involves a controlling question of law. A "controlling question of law" within the meaning of § 1292(b) is one which is determinative of a basic issue in the case. While the decision should not be merely collateral or incidental, it need not involve a question dispositive of the entire litigation. See United States v. Woodbury, supra; Kroch v. The Texas Co., 167 F. Supp. 947 (S.D.N.Y. 1956). Orders denying motions to eliminate private antitrust claims barred by the statute of limitations are typical of those which the Second Circuit as well as other

courts have allowed to be certified or appealed. See Herman Schwabe, Inc. v. United Shoe Machinery Corp., 274 F.2d 608 (2d Cir.), cert. denied, 363 U.S. 811 (1960); Banana Distributors, Inc. v. United Fruit Co., 269 F.2d 790 (2d Cir. 1959); Hertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959); Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2d Cir. 1962), cert. denied, 373 U.S. 909 (1963); United Shoe Machinery Corp. v. International Shoe Machine Corp., 275 F.2d 459 (1st Cir. 1960).

3. The controlling question is one as to which there is substantial ground for difference of opinion. Without reiterating here the contentions raised by defendants which the Court has considered and rejected, defendants respectfully urge that the order is uniquely suited for interlocutory review because controlling precedents are lacking for the Court's determinations that (a) Congress, in adding the one-year tolling provision to § 5(b) in 1955, intended that the one year should not begin to run until 60 days after entry of the final judgment, and (b) the Government action continued to "pend" after all liability aspects of the original judgment were affirmed by the Supreme Court. These issues are quite likely to arise again in other cases.

Only by implication can the Supreme Court's decision in Minnesota Mining & Mfg. Co. v. New York Wood Finishing Co., 381 U.S. 311 (1965), and the subsequent interpretation of it by other courts (in cases not germane to these), be said to undermine the cases upon which defendants rely for the liability-relief distinction -- a distinction not rejected by those other courts. Indeed, defendants believe their contentions are wholly consistent with the policy of 3M and will not deprive even moderately diligent antitrust plaintiffs of any of the benefits which Congress intended to give them.

At the very least, there are substantial grounds for difference of opinion as to whether the 60 days "appeal time", when no appeal is taken, runs consecutively or concurrently with the statutory "one year thereafter", or whether Congress intended the latter as an extension of and substitute for the preexisting judicial standard of a 60-day grace period. Even if certification is limited to this latter question, it would affect three alleged class actions (on behalf of all governmental entities in the States of New Jersey, Connecticut and Maryland) and one other complex case, Twentieth Century Fox Film Corp. v. Grinnell Corporation, et al. (S.D.N.Y. 65 Civ. 3229).

Finally, it should be noted that defendants are not seeking a stay of proceedings in the District Court pending such an appeal. Instead, defendants intend to diligently pursue their appeal while continuing to cooperate with plaintiffs to expedite discovery in the District Court.

For the above reasons, we respectfully urge that the Court give the certification required to permit the Court of Appeals to grant appellate review at this stage.

Sincerely,

Denis G. McInerney

Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York

cc: Weil, Gotshal & Manges, Esqs.
Parker, Chapin & Flattau, Esqs.
Liebman, Eulau, Robinson & Perlman, Esqs.
Casey, Lane & Mittendorf, Esqs.

White & Case, Esqs.
Kelley Drye Newhall Maginnes & Warren, Esqs.
Olwine, Connelly, Chase, O'Donnell & Weyher, Esqs.

1156

EXHIBIT 2

C O P Y

October 21, 1969

Hon. Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: Russ Togs, Inc., et al. v.
Grinnell Corporation, et al.

Dear Judge Metzner:

There is submitted herewith a proposed order on behalf of the plaintiffs pursuant to your Honor's decision dated October 3, 1969, on defendants' motion for partial summary judgment.

This proposed order differs from that submitted by the attorneys for the Grinnell Corporation in that it does not provide for certification pursuant to 28 U.S.C. §1292(b) to the Court of Appeals of the questions decided by your Honor.

The plaintiffs submit that the questions of law decided herein do not involve areas as to which there is substantial ground for differences of opinion within the meaning of 28 U.S.C. § 1292(b). It is respectfully submitted that the authorities relied upon by plaintiffs in opposition to the motion and the opinion thereon dated October 3, 1969, make it abundantly clear that the decision reached by the Court herein clearly accords with the authorities relating to the pendency of a Government action and with the mandates of the Supreme Court of the United States as to the approach to be taken in the determination of issues such as were posed on the instant application. A basic prerequisite for certification is thus lacking.

C O P Y

It is further apparent that the ultimate termination of the litigation before this Court would not be materially advanced by an immediate appeal from this order. Regardless of the outcome on this motion, each of the plaintiffs who have brought suit would continue to have a cause of action against the defendants. Moreover, there exists a substantial number of plaintiffs to which the motion was not addressed where cases involve most of the questions raised in the matters as to which the motion applied. Therefore, appellate review at this time would not materially shorten the time necessary to dispose of the pending litigation.

Certification is therefore opposed by the plaintiffs to which defendants' motion is addressed, including those who seek the inclusion of the "appeal time" in order to secure the benefit of the tolling provisions of Section 5(b) of the Clayton Act.

For the above reasons, the plaintiffs respectfully urge the Court to deny certification, as requested by the defendants, and to sign the order submitted on behalf of the plaintiffs.

Very truly yours,

Barry J. Brett

BJB:mjs
Enclosure

cc: Cahill, Gordon, Sonnett, Reindel & Ohl
White & Case
Kelly Dryer Newhall Maginnes & Warren
Stickles, Hayden, Kennedy, Mort & Van Steenburgh
Casey, Lane & Mittendorf
Weil, Gotshal & Manges
Liebman, Eulau, Robinson & Perlman
Royall, Koegel & Wells
Berman, Paley, Goldstein & Berman

1159

EXHIBIT 3

Obj. Exh. C.

HOWREY & SIMON

1730 PENNSYLVANIA AVENUE, NORTHWEST
WASHINGTON, D. C. 20006

TELEPHONE
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RICHARD S. HARRELL
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WILLIAM J. HUNTER, JR.
ROBERT J. BROOKHISER, JR.
FREDERICK S. FREI

S. CHESTERFIELD OPPENHEIM
HAROLD D. RHYNEDANCE, JR.
OF COUNSEL

November 6, 1975

Thomas D. Brislin, Esquire
Lord, Day & Lord
25 Broadway
New York, New York 10007

Re: Grinnell Fee Appeal

Dear Tom:

This confirms our telephone conversation that on behalf of Objectors, we have decided not to undertake the burden of reviewing whatever time records Mr. Berger's office might have maintained during the period of time for which fees are claimed in the above-referenced matter. A review of the affidavits submitted in support of Petitioner's fee applications makes it clear that there were, in fact, substantial time gaps in his office's record-keeping procedures, and hence there are no records to be reviewed for significant blocks of time which have been "reconstructed". Based on our practical experience, it is clear that any practicing attorney would find it difficult -- if not impossible -- to reconstruct accurately records of his time on a given day last week, much less months and years after the fact. In short, we find the "reconstructed" time lacking in credibility.

Sincerely,

G. Joseph King

GJK/fle

HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006
(202) 872-8800

Obj. Exh. D.

September 2, 1975

Honorable Charles M. Metzner
United States District Judge for
the Southern District of New York
P. O. Box 1000
New York, New York 10005

Re: City of Detroit v. Grinnell

Dear Judge Metzner:

I have a letter dated August 12, 1975 from Gordon B. Spivack, Esquire, of Messrs. Lord, Day & Lord advising me that they had been advised by your office that a hearing in the above matter on pending fees would be scheduled for mid October or shortly thereafter. He suggested that I advise you of any suggestions that we have concerning this hearing. I have two such suggestions:

1. I believe that notice must be sent to the class members of this fee hearing. I am aware of the fact that in a similar case one judge declined to send out a new notice to the members of the class. I call to your attention, however, that a very large percentage of the attorneys' time now claimed in this case is said to have been spent by General Brownell's firm in support of Mr. Berger's application for fees. This is not only legal work done since the filing of Mr. Berger's initial application, but the class was never advised that Mr. Berger's fee application would include in substantial part work done by General Brownell's firm in support of Mr. Berger's fee application.

2. Secondly, one of the issues which will apparently be before your Honor on this fee application is whether Mr. Berger (or his counsel) are entitled to fees for supporting the Berger fee application. We contend they are not. If they are, any class member objecting to the fees does so under peril of increasing the total fees to counsel even though he is successful in his objections to the fee application. This very issue is before the court

on fees awarded to Harold Kohn in the Lindy Bros. case. You will recall that the District Court's initial award to Mr. Kohn was reversed by the Third Circuit in the Lindy Bros. case which was followed by the Second Circuit in this case. On the second hearing, the District Court awarded Mr. Kohn fees for the time spent in defending (unsuccessfully) his fee applications. That issue is now back before the Third Circuit, and oral argument is set for September 8, 1975. You may wish to postpone the hearing in this case until the Third Circuit acts in Lindy Bros.

Yours very truly,

William Simon

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

Obj. Exh. E.

CHAMBERS OF
CHARLES M. METZNER
DISTRICT JUDGE

RECEIVED SEP 2 3 1975

September 25, 1975

City of Detroit, et al. v. Grinnell Corporation, et al., 68 Civ. 4026, 4027, 4028

Dear Sirs:

The hearing to fix the fees of Mr. Berger in the above matter has been set for Monday, November 10, 1975, at 10:00 A.M. in Room 318. All papers in connection with the hearing should be served and filed no later than October 31. It is suggested that such papers be brought directly to Judge Metzner's chambers for filing.

The court has noted a request from Mr. Simon that notice of this fee hearing be sent to all class members. Judge Metzner is of the opinion that this is unnecessary and unwarranted.

Very truly yours,

G. M. Addison

Secretary

Gordon B. Spivack, Esq.
Lord, Day & Lord
25 Broadway
New York, N. Y.

William Simon, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Barry J. Brett, Esq.
Parker, Chapin & Flattau
530 Fifth Avenue
New York, N.Y. 10036

MOST FAVORABLE SUBSCRIBER SETTLEMENT BASIS APPLIED TO PENDING CASES

	Paid To (1957-68)					
	ADT	AFA	Holmes	Total Paid All Defendants	Better of 60/80 or 10%	Percentage of Total Paid
Allied Stores	$2,731,994	$ 118,508	$ 20,308	$2,870,810	$ 344,000	12%
Arlan's	179,107		100,216	279,323	59,000	21%
Associated Dry Goods	1,436,551			1,436,551	204,000	14%
Berkey Photo	118,461	2,292	13,240	133,993	24,000	18%
B.V.D.	108,619	6,033		114,652	19,000	17%
City Stores	1,725,248	225,528		1,950,776	312,000	16%
Cunningham Drugs	90,273			90,273	20,000	22%
Federal's Dept. Stores	258,762			258,762	27,000	10%
Federated Dept. Stores	2,312,048	17,257		2,329,305	280,000	12%
Gimbel's	731,138	237,474		968,612	97,000	10%
Grand Union	242,832	1,254	13,127	257,213	64,000	25%
W.T. Grant	177,064	11,376		188,440	40,000	21%
Hutzler Bros.	322,854			322,854	46,000	14%
Interstate Dept. Stores	803,447			803,447	138,000	17%
S. Klein	297,617	7,652		347,413	56,000	16%
Lerner Stores	87,024	15,863	27,880	130,767	26,000	20%
Macy's	2,186,721	317,839	213,202	2,717,762	390,000	14%
McCrory's	218,848	13,075	3,438	235,364	33,000	14%
Montgomery Ward	1,004,510			1,004,510	162,000	16%
J. C. Penney	1,077,618	23,896		1,101,514	198,000	18%
Rapid American	79,741	6,037		85,778	13,000	15%
Shoe Corp.	176,650	948		177,598	32,000	18%
Spartan's	1,443,391			1,443,391	145,000	10%
Walworth	122,976			122,976	23,000	18%
Zale	187,387	7,390		194,777	25,000	13%
Zayre	1,095,170		17,846	1,113,016	245,000	22%
Federal Reserve Banks	680,000		57,916	737,916	162,000	22%
State of Conn., N.J. and Md. Classes				Unknown	Unknown	
				$21,417,793	$3,184,000	Avge. 15%

1164

1/10/75

Olg. Ex. P

N O T E

Because the official Opinion (A1165-A1175) did not lend itself to high quality reproduction in this Appendix, for the Court's convenience a copy of the Opinion as reported in 5 CCH Trade Reg. Rptr. ¶ 60,913, has also been included immediately following, at A1176-A1179.

COPY #44276 opinion 6353-40-3

U.S. DISTRICT COURT
FILED
APR 21 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.

v. 68 Civ. 4026

GRINNELL CORPORATION, et al.

MANHATTAN-HARD, INC., et al.

v. 68 Civ. 4038

GRINNELL CORPORATION, et al.

1225 VINE STREET BUILDING, INC.,

v. 68 Civ. 4027

GRINNELL CORPORATION, et al.

METZNER, D. J.:

Pursuant to the direction of the Court of Appeals, 495 F.2d 448, this court held an evidentiary hearing on the application for fees by counsel for the class in this litigation. Counsel seeks fees of $1,248,614.50, $53,267.50 for the services of para-professionals, and $27,305 for the services of certified public accountants.

since their inception all the cases pending in the country against Grinnell and its codefendants have been assigned to this judge and the court is fully familiar with the ramifications of all the proceedings. Reference to the work involved and the magnitude of the litigation may be found in 356 F. Supp. 1380, and need not be repeated here. [illegible]

The opinion of the Court of Appeals in this case and by the Third Circuit in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (1973), placed new ground in the area of determining the amount of fees to be awarded to successful counsel for plaintiffs in class actions. These cases make it clear that "the first legitimate starting point for analysis" is to multiply the number of hours spent by counsel by a reasonable hourly rate for the time spent. Counsel has admitted that for certain periods there are no time records available. This covers September 1970 to February 1971 for Berger and Montague, January to April 1972 for Berger alone, and July 1971 to December 1971 for Montague alone. Time records were reconstructed for those periods based on the proceedings

BEST COPY AVA

that took place in the litigation at the time. This is the same procedure followed on the remand in the Lindy Bros. case and accepted by Judge Harvey, 382 F. Supp. 899 (E.D. Pa. 1974). Newberg kept time records from 1969 to September 1970, but did not keep any from then until March 1972. His records for the latter period were reconstructed in April 1972. [illegible] After hearing the evidence, I find that the hours allocated for the periods that were not covered by time records are fair and reasonable.

In view of counsel's success in numerous other large class action lawsuits in the antitrust field, he obviously is a highly competent attorney in this field, with partners and associates of the same caliber. His work in this case demonstrated a high degree of skill.

The hourly rates requested by Newberg, Montague, Schanbelan, Lerner and Rodos are higher than those requested for the same attorneys in the Lindy case. Part of that difference is attributable to the time when the services were rendered and the balance is not sufficient to justify reduction.

AILABLE

The objectant makes much of the fact that counsel had the benefit of the prior judgment by the government against these defendants. However, little weight can be attributable to that fact in this case. As I pointed out on the application to approve the settlement (356 F. Supp. at 1383), the government judgment could well have little impact as a practical matter in this litigation. The Court of Appeals stated at 495 F.2d 448, 455-56:

> "The decree which resulted from the government's Grinnell victory, however, has very little to do with the instant class actions. . . . In fact the basis for the government decree was probably adverse to the interests of these subscriber-plaintiffs . . . ."

Consequently, counsel was starting from scratch in this litigation. Under all the circumstances, and again referring to the facts set forth in the opinion in 356 F. Supp. 1380, the settlement was an advantageous one obtained with a high degree of legal skill.

Objectant seeks to deprecate the amount of the settlement in the class actions when compared with settlements made in some of the individual cases. The comparison does not stand up when it is understood that nearly 90,000

possible claimants were covered by the class action, some 14,000 of whom filed claims. The class actions necessarily embraced a less advantageous position than an individual claim separately prosecuted, under the facts as they existed. Only five of the claimants objected to the terms of the settlement. Reference should also be made to the fact that plaintiffs in eleven individual actions were satisfied with the settlement, participated in its fruits and thereby discontinued their individual actions. After extensive review of the facts, the settlement was approved by this court and affirmed by the Court of Appeals as eminently fair and reasonable.

Finally, in evaluating the risk factor in this case, we come to the question of whether "the issues are novel and complex or straightforward and well worn?" 495 F.2d at 471. I would say that the issues here were novel and complex, and again refer to the details set forth in 356 F. Supp. 1380.

When this point is reached, the Court of Appeals states that the litigation factor might well be translated into mathematical terms. We are now back to the [illegible] when it is understood that nearly 50,000

old percentage bugaboo that created the contingency fee syndrome, although on a restricted scale since the amount of the recovery now has less impact in determining the fee to be paid.

The hearing in this case was originally delayed to afford counsel an opportunity to proceed initially before Judge Harvey with an evidentiary hearing to fix counsel fees in the Plumbing Firtures case, Lindy Bros. Builders, Inc. v. American Radiator, 382 F. Supp. 999. Petitioning counsel and objectant's counsel are the same in both cases. The court has read Judge Harvey's opinion with great interest. Both cases involve settlements of antitrust litigation. The evidence on the factors to be weighed turned out to be quite similar, and the categories of activities practically the same.

A reasonable hourly rate for the attorneys who worked on this case, taking into account the periods of time when the services were rendered, is as follows:

David Berger	$125.00
Herbert B. Newberg	100.00
H. Laddie Montague	100.00
Harold Berger	100.00

Alexander Frey	$100.00
Warren D. Mulloy	100.00
Leonard Barrack	45.00
Joseph R. Lally	45.00
Bruce K. Cohen	60.00
Joel C. Hardith	60.00
Gerald R. Rocco	50.00
Alan H. Lerner	45.00
Harril G. Davidoff	50.00
Barry H. Shaw	85.00
Earl D. Greenburgh	50.00
Pauline C. Cohen	75.00
Howard L. Schambelan	65.00

I do not find great dispute as to the hours allocated to each category of activity charged by each of the individuals. I have made changes in the hourly rates requested and used in fixing the compensation by categories. For example, Lerner's rate was requested at $85 per hour. The work he did on this case occurred in 1968, when he had been admitted to the bar only two years. Since these adjustments do not materially affect the ultimate calculations, I have not changed the totals

for the categories. I find the following allocation of the basic fee by category:

Category	Hours	Basic Fee
(a) Pleadings and motions	32.80	$ 3,130.00
(b) Discovery	193.00	18,901.00
(c) Court appearances and preparation	282.79	31,000.00
(d) Settlement negotiations	244.50	25,727.50
(e) Settlement procedures	400.25	41,262.50
(f) Settlement administration	1,349.00	120,683.50
(g) Fee Application	194.25	19,692.50
(h) Briefs and legal research	502.50	50,920.00
(i) Appellate proceedings after Final Judgment	236.75	26,237.50
(j) General	156.65	16,211.25
(k) Fee agreements and interventions	10.00	1,000.00
TOTAL:	3,377.75	$352,765.75

The total basic fee amounts to $352,765.75.

I agree with Judge Harvey that counsel is entitled to compensation for preparing and supporting their fee applications in this court and the Court of Appeals. I also agree with him that such compensation is adequate at the basic hourly rate.

As to appellate proceedings after judgment which involved both the reasonableness of the settlement and the amount of the award of counsel fees, I find that

the ultimate calculations, I have not changed the totals

the basic fee for this activity should be halved, with one portion allocable to the fee application category and the other to a risk factor category.

The hours spent on settlement administration should be compensated at twice the basic rate.

The complexity of the issues presented in this litigation, the competence with which they were presented, the success achieved and, most important, the risk of litigation merit multiplying by 3 the basic fees in the remaining categories of work performed to October 31, 1975.

The fee to be paid to counsel under this analysis results in the following allocations:

Pleadings and motions	$ 9,390.00
Discovery	50,703.00
Court appearances and preparation	94,800.00
Settlement negotiations (include 1/2 of appellate proceedings)	116,568.00
Settlement procedures	123,786.00
Settlement administration	240,125.00
Fee application (include 1/2 of appellate proceedings)	32,811.00
General	48,633.00
Fee agreement	1,000.00
Total	$717,817.00

Brought forward	$717,817.00
Paraprofessionals at cost (495 F.2d 448,473)	53,287.00
Accountants	27,305.00
Total Award	$798,389.00

Counsel has fee arrangements with 21 claimants whose claims will result in total payments of $44,034. Counsel has agreed that his compensation from these clients shall be the same as paid by other class members.

Finally, there is an issue that was before the court originally as to claims by other attorneys for compensation from counsel here out of any fee which the court might award. Counsel strongly opposed those applications on the merits and denied that any of the efforts he put forth in achieving the result were aided in any way by the other attorneys. The court reserved determination of those matters, but does not have to pass upon them. Petitioning counsel has agreed to make certain payments out of his fee to settle those claims. Since this does not result in duplication of payment, I have no objection to the arrangement.

As to any further services that may require the fixation of fees, counsel may apply ex parte on proper

affidavit for their payment.

So ordered.

Dated: New York, N. Y.
April 21, 1976

CHARLES H. METZNER
U. S. D. J.

[Opinion]

METZNER, D. J.: Pursuant to the direction of the Court of Appeals [1974-1 TRADE CASES ¶ 74,986], 495 F. 2d 448, this court held an evidentiary hearing on the application for fees by counsel for the class in this litigation. Counsel seeks fees of $1,248,614.50, $53,267.50 for the services of para-professionals, and $27,505 for the services of certified public accountants.

Since their inception all the cases pending in the country against Grinnell and its co-defendants have been assigned to this judge and the court is fully familiar with the ramifications of all the proceedings. Refer-

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ence to the work involved and the magnitude of the litigation may be found in 356 F. Supp. 1380 [1973 TRADE CASES ¶74,341], and need not be repeated here.

The opinion of the Court of Appeals in this case and by the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.* [1973-2 TRADE CASES ¶74,761], 487 F. 2d 161 (1973), plowed new ground in the area of determining the amount of fees to be awarded to successful counsel for plaintiffs in class actions. These cases make it clear that "the first legitimate starting point for analysis" is to multiply the number of hours spent by counsel by a reasonable hourly rate for the time spent. Counsel has admitted that for certain periods there are no time records available. This covers September 1970 to February 1971 for Berger and Montague, January to April 1972 for Berger alone, and July 1971 to December 1971 for Montague alone. Time records were reconstructed for those periods based on proceedings that took place in the litigation at the time. This is the same procedure followed on the remand in the *Lindy Bros.* case and accepted by Judge Harvey. [1974-2 TRADE CASES ¶75,361] 382 F. Supp. 999 (E. D. Pa. 1974). Newberg kept time records from 1968 to September 1970, but did not keep any from then until March 1972. His records for the latter period were reconstructed in April 1972.

After hearing the evidence, I find that the hours allocated for the periods that were not covered by time records are fair and reasonable.

In view of counsel's success in numerous other large class action lawsuits in the antitrust field, he obviously is a highly competent attorney in this field, with partners and associates of the same caliber. His work in this case demonstrated a high degree of skill.

The hourly rates requested by Newberg, Montague, Schambelan, Lerner and Rodos are higher than those requested for the same attorneys in the *Lindy* case. Part of that difference is attributable to the time when the services were rendered and the balance is not sufficient to justify reduction.

The objectant makes much of the fact that counsel had the benefit of the prior judgment by the government against these defendants. However, little weight can be attributable to that fact in this case. As I pointed out on the application to approve the settlement (356 F. Supp. at 1388), the government judgment could well have little impact as a practical matter in this litigation. The Court of Appeals stated at 495 F. 2d 448, 455-56:

> The decree which resulted from the government's *Grinnell* victory, however, has very little to do with the instant class actions. . . . In fact the basis for the government decree was probably adverse to the interests of these subscriber-plaintiffs . . . .

Consequently, counsel was starting from scratch in this litigation. Under all the circumstances, and again referring to the facts set forth in the opinion in [1973-1 TRADE CASES ¶74,341], 356 F. Supp. 1380, the settlement was an advantageous one obtained with a high degree of legal skill.

Objectant seeks to deprecate the amount of the settlement in the class actions when compared with settlements made in some of the individual cases. The comparison does not stand up when it is understood that nearly 90,000 possible claimants were covered by the class action, some 14,000 of whom filed claims. The class actions necessarily embraced a less advantageous position than an individual claim separately prosecuted, under the facts as they existed. Only five of the claimants objected to the terms of the settlement. Reference should also be made to the fact that plaintiffs in eleven individual actions were satisfied with the settlement, participated in its fruits and thereby discontinued their individual actions. After extensive review of the facts, the settlement was approved by this court and affirmed by the Court of Appeals as eminently fair and reasonable.

Finally, in evaluating the risk factor in this case, we come to the question of whether "the issues are novel and complex or straightforward and well worn?" 495 F. 2d at 471. I would say that the issues here were novel and complex, and again refer to the details set forth in 356 F. Supp. 1380.

When this point is reached, the Court of Appeals states that the litigation factor might well be translated into mathematical terms. We are now back to the old percentage bugaboo that created the contingency fee syndrome, although on a restricted scale since the amount of the recovery now has less impact in determining the fee to be paid.

The hearing in this case was originally delayed to afford counsel an opportunity to proceed initially before Judge Harvey with an evidentiary hearing to fix counsel fees in the Plumbing Fixtures case. *Lindy Bros.*

Builders, Inc. v. American Radiator [1974-2 TRADE CASES ¶75,361], 382 F. Supp. 999. Petitioning counsel and objectant's counsel are the same in both cases. The court has read Judge Harvey's opinion with great interest. Both cases involve settlements of antitrust litigation. The evidence on the factors to be weighed turned out to be quite similar, and the categories of activities practically the same.

A reasonable hourly rate for the attorneys who worked on this case, taking into account the periods of time when the services were rendered, is as follows:

David Berger	$125.00
Herbert B. Newberg	100.00
H. Laddie Montague	100.00
Harold Berger	100.00
Alexander Frey	100.00
Warren D. Mulloy	100.00
Leonard Barrack	45.00
Joseph R. Lally	45.00
Bruce K. Cohen	60.00
Joel C. Meredith	$60.00
Gerald R. Rodos	50.00
Alan M. Lerner	45.00
Merril G. Davidoff	50.00
Barry N. Shaw	85.00
Earl D. Greenburgh	50.00
Pauline C. Cohen	75.00
Howard L. Schambelan	65.00

I do not find great dispute as to the hours allocated to each category of activity charged by each of the individuals. I have made changes in the hourly rates requested and used in fixing the compensation by categories. For example, Lerner's rate was requested at $85 per hour. The work he did on this case occurred in 1968, when he had been admitted to the bar only two years. Since these adjustments do not materially affect the ultimate calculations, I have not changed the totals for the categories. I find the following allocation of the basic fee by category:

Category	Hours	Basic Fee
(a) Pleadings and motions	32.80	$ 3,130.00
(b) Discovery	173.00	16,901.00
(c) Court appearances and preparation	282.75	31,600.00
(d) Settlement negotiations	244.50	25,737.50
(e) Settlement procedures	400.25	41,262.50
(f) Settlement administration	1,349.60	120,063.50
(g) Fee Application	194.25	19,692.50
(h) Briefs and legal research	502.50	50,930.00
(i) Appellate proceedings after Final Judgment	236.75	26,237.50
(j) General	154.85	16,211.25
(k) Fee agreements and interventions	10.00	1,000.00
Total	3,577.75	$352,765.75

The total basic fee amounts to $352,765.75.

I agree with Judge Harvey that counsel is entitled to compensation for preparing and supporting their fee applications in this court and the Court of Appeals. I also agree with him that such compensation is adequate at the basic hourly rate.

As to appellate proceedings after judgment which involved both the reasonableness of the settlement and the amount of the award of counsel fees, I find that the basic fee for this activity should be halved, with one portion allocable to the fee application category and the other to a risk factor category.

The hours spent on settlement administration should be compensated at twice the basic rate.

The complexity of the issues presented in this litigation, the competence with which they were presented, the success achieved and, most importantly, the risk of litigation merit multiplying by 3 the basic fees in the remaining categories of work performed to October 31, 1975.

The fee to be paid to counsel under this analysis results in the following allocations:

Pleadings and motions	$ 9,390.00
Discovery	50,703.00
Court appearances and preparation	94,800.00
Settlement negotiations (include ½ of appellate proceedings)	116,568.00
Settlement procedures	123,786.00
Settlement administration	240,126.00
Fee application (include ½ of appellate proceedings)	32,811.00
General	48,633.00
Fee agreement	1,000.00
Total	$717,817.00
Brought forward	$717,817.00
Paraprofessionals at cost (495 F. 2d 448, 473)	53,267.00
Accountants	27,505.00
Total Award	$798,589.00

Counsel has fee arrangements with 21 claimants whose claims will result in total payments of $44,054. Counsel has agreed that his compensation from these clients shall be the same as paid by other class members.

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Finally, there is an issue that was before the court originally as to claims by other attorneys for compensation from counsel here out of any fee which the court might award. Counsel strongly opposed those applications on the merits and denied that any of the efforts he put forth in achieving the result were aided in any way by the other attorneys. The court reserved determination of those matters, but does not have to pass upon them. Petitioning counsel has agreed to make certain payments out of his fee to settle those claims. Since this does not result in duplication of payment, I have no objection to the arrangement.

As to any further services that may require the fixation of fees, counsel may apply ex parte on proper affidavit for their payment.

So ordered.

Amended
Copy Received

U.S. DISTRICT COURT
APR 27 1976
S.D.C.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.

v. 68 Civ. 4026

GRINNELL CORPORATION, et al.

MANHATTAN-WARD, INC., et al.

v. 68 Civ. 4028

GRINNELL CORPORATION, et al.

#1/4/276

1225 VINE STREET BUILDING, INC.

v. 68 Civ. 4027

GRINNELL CORPORATION, et al.

METZNER, D. J.:

The order of this court dated April 21, 1976 is amended by including on page 9 "Briefs and Legal Research --$152,790," and by changing the subtotal from $717,817.00 to $870,607.00. The Total Award figure on page 10 is thus increased from $798,589.00 to $951,379.00.

So ordered.

1180

Dated: April 26, 1976

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al., Plaintiffs, -against- GRINNELL CORPORATION, AMERICAN DISTRICT TELEGRAPH COMPANY, HOLMES ELECTRIC PROTECTIVE COMPANY and AUTOMATIC FIRE ALARM COMPANY OF DELAWARE, Defendants.	FINAL JUDGMENT 68 Civ. 4026 (E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al., Plaintiffs, -against- GRINNELL CORPORATION, et al., Defendants.	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC., et al., Plaintiffs, -against- GRINNELL CORPORATION, et al., Defendants.	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)

The Court having held an evidentiary hearing on November 10, 1975 to determine the Petition of David Berger, P.A., Counsel for Class Representatives, for an award of counsel fees and costs (hereinafter "Petition"), and the Court having considered the written submissions in support of and in opposition to approval of said Petition and having received testimony and heard all persons appearing and requesting to be heard and due

deliberation having been had thereon, pursuant to this Court's Decision and Order of April 21, 1976, as supplemented by its Decision and Order of April 26, 1976, and, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, having expressly directed the entry of this Final Judgment as to an award of attorneys' fees to David Berger, P.A., and having determined that there is no just reason for delay in entering this Final Order so that this Court's Decision and Order of April 21, 1976, can be implemented,

IT IS HEREBY ORDERED AND ADJUDGED:

1. Counsel for the Class Representatives, David Berger, P.A., Attorneys at Law (hereinafter "Counsel for the Class Representatives"), are allowed as out-of-pocket expenses in connection with these actions not yet reimbursed, to October 31, 1975, $53,267.00 for costs in the employment of paraprofessionals and $27,505.00 for costs in the employment of certified public accountants, to be paid from the remainder of the Settlement Fund. Requests for further reimbursement for legal services and expenses by Counsel for the Class Representatives will be entertained only on an application setting forth categories and dates when such services and expenses were incurred.

2. Counsel for the Class Representatives is awarded attorneys' fees for legal services through October 31, 1975 in the amount of $870,607.00, such fees to be paid from the remainder of the Settlement Fund in the above-entitled actions.

3. This Court retains jurisdiction of this matter for the purpose of:

(a) determining any further petition of Counsel for the Class Representatives for time expended subsequent to October 31, 1975 until final disposition of these actions;

(b) determining the manner and time of payment of said fees; and

(c) determining further allowance of out-of-pocket expenses to Counsel for the Class Representatives.

4. A copy of this Final Judgment shall be docketed in each of the above-entitled actions with the same force and effect as if the original thereof was filed therein.

Dated: New York, New York
April 24, 197

U.S.D.J.

JUDGMENT ENTERED - 4/25/76
Raymond F. Burghardt
CLERK

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al. ✓	:	68 CIV. 4026
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1478
MANHATTAN-WARD, INC., et al.	:	68 CIV. 4028
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1489
1225 VINE STREET BUILDING, et al.	:	68 CIV. 4027
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1479)

NOTICE OF APPEAL

Notice is hereby given that Bay Fair Shopping Center; Exxon Corporation, successor by merger to the Humble Oil & Refining Company; Friendswood Development Company; International Lubricant Corporation; and Shell Oil Company, claimants herein, hereby appeal to the United States Court of Appeals for the Second Circuit from the Final Judgment entered April 28, 1976, awarding attorneys fees out of the settlement fund of $870,607.00 to David Berger, which amount is excessive and unsupported by the record.

Respectfully submitted,

WILLIAM SIMON
G. JOSEPH KING
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 872-8800

Attorneys for
Bay Fair Shopping Center, Exxon Corporation, Friendswood Development Company, International Lubricant Corp., and Shell Oil Company

Dated: May 25, 1976

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	:	68 CIV. 4026 (CMM)
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1478
MANHATTAN-WARD, INC., et al.	:	68 CIV. 4028
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1489
1225 VINE STREET BUILDING, et al.	:	68 CIV. 4027
v.	:	
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Telephone: (202) 872-8800

Attorneys for
Bay Fair Shopping Center, Exxon Corporation, Friendswood Development Company, International Lubricant Corp., and Shell Oil Company

Dated: May 25, 1976

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	:	68 CIV. 4026
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1478)
MANHATTAN-WARD, INC., et al.	:	68 CIV. 4028
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1489)
1225 VINE STREET BUILDING, et al.	:	68 CIV. 4027
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Telephone: (202) 872-8800

Attorneys for
Bay Fair Shopping Center, Exxon Corporation, Friendswood Development Company, International Lubricant Corp., and Shell Oil Company

Dated: May 25, 1976

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	:	68 CIV. 4026 (CNM)
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1478)
MANHATTAN-WARD, INC., et al.	:	68 CIV. 4028 (CNM)
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1489)
1225 VINE STREET BUILDING, et al.	:	68 CIV. 4027 (CNM)
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1479)

STIPULATION RE CONSOLIDATION
FOR PURPOSES OF APPEAL

It is hereby stipulated by the undersigned counsel for appellants and appellees that for purposes of appeal, the three above Civil Actions may be consolidated, and that the appeal proceed for all purposes in the action entitled City of Detroit v. Grinnell Corporation, 68 CIV. 4026 (CNM).

Howrey & Simon

By: [signature]

Counsel for Appellants

Lord, Day & Lord

By: [signature]

Counsel for Appellees

June 8, 1976

U.S.D.C.
JULY 6, 1976
S.D. N.Y.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	:	68 CIV. 4026 (CNM)
v.		
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1478)
MANHATTAN-WARD, INC., et al.	:	68 CIV. 4028 (CNM)
v.		
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1489)
1225 VINE STREET BUILDING, et al.	:	68 CIV. 4027 (CNM)
v.		
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1479)

STIPULATION AS TO RECORD

Pursuant to Rule 11(f) of the Federal Rules of Appellate Procedure, it is hereby stipulated by the undersigned counsel for the parties that only those documents listed in the agreed upon "Index To The Record On Appeal" need be transmitted to the Court of Appeals for purposes of the instant appeal.

Howrey & Simon

By: _____
Counsel for Appellants

Lord, Day & Lord

By: _____
Counsel for Appellees

June 17, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF DETROIT, et al. v. GRINNELL CORPORATION, et al., BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, Claimants, Appellants.	Docket No. 76-7252

CERTIFICATE OF SERVICE

I, G. Joseph King, an attorney for appellants in the above-entitled appeal, hereby certify that on the 30th day of July, 1976, I served two copies of the Brief For Class Members-Appellants and one copy of the two-volume Appendix, in accordance with Rules 25(a), 30(b) and 31(b), Fed.R.App.P., upon Gordon B. Spivack, Esquire, Lord, Day & Lord, 25 Broadway, New York, New York, 10004, by depositing same in the United States mail, first class postage prepaid.

G. Joseph King